SUPREME COURT, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOHN CROSETTO,

Petitioner,

vs.

STATE BAR OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an entity, which claims to be an "arm of the state," is entitled to sovereign immunity under the Eleventh Amendment in federal court after dropping that defense and when a money judgment against it will not be paid out of the state treasury.

2. Whether, after a Circuit Court raises a sovereign immunity defense *sua sponte* and after a defendant on a remand raises that defense, a party under Fed. R. Civ. P. 15 can amend a complaint by naming nominal defendants to preserve subject matter jurisdiction.

3. Whether, under *Keller,* a unified bar can:
   a. require its members to first submit their constitutional claims to final and binding arbitration before they can be heard in federal court;
   b. give preclusive effect to any arbitration awards issued under such an arbitration plan.

PARTIES TO THE PROCEEDING

Petitioner John Crosetto is licensed to practice law in the State of Wisconsin. He was a plaintiff in the District Court and appellant in the Court of Appeals. Respondent State Bar of Wisconsin is a unified bar association headquartered in Madison, Wisconsin. It was a defendant in the District Court and an appellee in the Court of Appeals.

None of the parties to this proceeding is a corporation.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96 ___

John Crosetto, Petitioner

vs.

State Bar of Wisconsin, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner John Crosetto respectfully petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit in the above-captioned case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. App. at 1a-2a.[1] The District Court's decisions granting summary judgment (App. at 3a-16a) and denying Petitioner's motion to supplement the complaint (App. at 17a-21a) are unreported. The prior opinion of the Court of Appeals ordering the remand is reported at 12 F.3d. 1396. App. 22a-40a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 1996. App. 1a-2a.[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

The pertinent provisions of the United States Constitution are the First, Eleventh, and Fourteenth Amendments. The pertinent provision of the Wisconsin Supreme Court's Rules is SCR 10.03(5)(b). The pertinent statutory provision is 42 U.S.C. § 1983. All of these provisions are set forth in App. at 41a-47a.

STATEMENT OF THE CASE

A. Introduction And Summary

This case is a civil rights action brought by Petitioner John Crosetto ("Crosetto") in 1988 against Respondent State Bar of Wisconsin ("State Bar") and others. The suit charges that Respondent has violated his rights under the First and Fourteenth Amendments by, inter alia, forcing him to

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1All references to "App." are to the Appendix contained in the Petition For Writ Of Certiorari.

financially support certain bar activities; by failing to maintain constitutionally mandated records; and by maintaining an unconstitutional dues reduction-arbitration plan. His action initially named as co-defendants Stephen L. Smay ("Smay"), Respondent's Executive Director, and the then Justices of the Wisconsin Supreme Court. The District Court dismissed the latter as parties and it subsequently entered summary judgment in favor of Respondent and Smay. The Seventh Circuit affirmed the dismissals of Smay and the members of the Wisconsin Supreme Court, but remanded to the District Court the question of whether Respondent is a state entity and entitled to sovereign immunity, a question it raised sua sponte.

Petitioner subsequently filed a Petition For Writ Of Certiorari with this Court which was denied.

On the remand, Respondent moved for summary judgment on the ground that it is a state entity and entitled to sovereign immunity under the Eleventh Amendment to the United States Constitution and that, as a result, the federal court lacked subject matter jurisdiction.

To counter Respondent's claim of lack of subject matter jurisdiction, Petitioner moved to supplement the complaint by, inter alia, naming as nominal defendants the individual members of Respondent's Board of Governors. The supplemental complaint also challenged Respondent's dues reduction-arbitration plan.

The District Court denied Petitioner's motion to supplement the complaint. It later granted Respondent's motion for summary judgment on the basis that it is a state entity and thus entitled to sovereign immunity.

The Seventh Circuit affirmed the District Court's rulings on the grounds that Petitioner's motion to supplement the complaint was barred by the terms of its mandate and that

Respondent's state agency status had just been recently resolved by a different Circuit Court panel in other pending litigation involving Respondent where it was found to be a state agency. App. 1a-2a.

B. Factual Background

Petitioner Crosetto practices law in the State of Wisconsin and is required to belong to Respondent and to financially support all of its legislative, political, and other bar activities not covered by a dues reduction plan.[2] Respondent is a unified bar which maintains its offices in Madison, Wisconsin.

1. LAWPAC

Petitioner and all other State Bar members at one time were required to financially support LAWPAC—a political action committee operated out of Respondent's offices and headed by one of its employees—which gave financial support to political candidates. Respondent admits that part of Petitioner's dues money was spent on LAWPAC before Respondent severed its relationship. It is impossible to determine how much of Petitioner's dues money was spent on LAWPAC because of Respondent's failure to maintain complete and accurate records for all of LAWPAC's expenses. R. 510, ¶s 21, 27-28.[3]

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[2]Petitioner is not challenging the constitutionality of Wisconsin's mandatory bar requirement. Petitioner initially raised, but subsequently dropped, such a challenge. Hence, that issue is not before this Court.

[3]All references to "R. 510" are to Plaintiffs' Statement Of Undisputed Facts In Opposition To Defendant's Second Motion For Summary Judgment. R. 510 refers to the specific parts of the record supporting the facts asserted therein.

A special study committee created by the Wisconsin Supreme Court found that "The State Bar created LAWPAC . . .;" that even after its governing structure was changed, LAWPAC "as a practical matter" still used the State Bar's mailing address and its files still were kept in the State Bar's offices; that a State Bar employee suggested to Respondent's Board of Governors that "The expedient of renting a separate postal box for LAWPAC would tend to conceal the relationship of the Bar and LAWPAC . . .;" that a separate postal box was then created; and that "throughout its existence, [a State Bar employee] has played the principal role in LAWPAC's activities." (R. 510) ¶ 22. The State Bar employee involved with LAWPAC admits that all of these findings are correct. (R. 510) ¶23.

2. Respondent's Record-Keeping Practices

Respondent's employees before the commencement of this litigation were not required to fill in and file their time reports—which are used to determine how much money Respondent spends on given bar activities—until the eleventh of the following month; i.e., from 11 to 42 days after the fact. Because of the inadequacy of such records, Respondent's employees were unable to ascertain how much of Petitioner's mandatory dues money was spent on particular bar activities when they were asked to do so at their depositions. (R. 510) ¶s 5-10.

Respondent changed its time-keeping and record-keeping procedures several months after Petitioner in 1990 amended the complaint to raise this issue (R. 127). Hence, time reports are now filled out daily and filed once a week. Respondent also changed its auditing practices in 1993 or 1994 after Petitioner raised this issue and claimed that Respondent's expenses were not being properly audited. Respondent admits firing one of its employees in part because of the issues raised in this litigation. (R. 510) ¶s 16-20.

3. Respondent's Dues Reduction-Arbitration Plan

Petitioner Crosetto and other State Bar members from July 1, 1992, to the present have been subjected to Respondent's dues reduction-arbitration plan which: 1), forces members to arbitrate constitutional challenges to the plan before they can proceed in federal court; and 2), gives preclusive effect to any arbitration awards issued thereunder. (R. 510) ¶ 47.

4. Respondent's Role

Respondent admits that it was not acting as an agent of the Wisconsin Supreme Court when it created LAWPAC, its political action committee, and that it did not rely on any rules, regulations, decisions, or orders of the Wisconsin Supreme Court when it established its record-keeping, time-keeping, and accounting practices. (R. 510) ¶s 14, 30.

Respondent adopted its current Dues Reduction and Arbitration Policy without prior approval from the Wisconsin Supreme Court. Furthermore, the Wisconsin Supreme Court from July 1, 1992, to the present has never reviewed any of Respondent's expenses to determine whether they are constitutionally permissible. (R. 510) ¶s 44, 45.

5. Respondent's Prior Representation That It Is Not A Governmental Entity

At the time Petitioner filed his complaint in May, 1988, Respondent was involved in a dispute with the United States Postal Service's Office of Classification and Rate Administration ("Postal Service") over revocation of Respondent's special bulk mailing privileges which enable Respondent to send mail at a cheaper rate. The Postal Service initially revoked the permit because it cannot be given to any governmental agency.

Respondent successfully challenged the revocation by stating in a June 22, 1989, letter from its attorney: "The bar is not a governmental entity." (Emphasis in original.) (R. 509) That letter referred to one of Respondent's earlier submissions to the Postal Service which "cited a decision of the United States Supreme Court which explicitly held that the bar was not a governmental entity" and which further stated: "the Supreme Court noted that the Bar was an independent organization, and not simply an arm of the Wisconsin Supreme Court."

The letter also stated that "the Supreme Court had therefore explicitly held that the Wisconsin bar was not an arm of the court but a 'quasipublic' entity." The letter added:

> "The Bar's pleading went on to characterize the numerous operational indicia that underscore the Bar's independence from the Wisconsin Supreme Court and every other state governmental entity: (1) the Governors of the State Bar are elected by members of the state bar rather than being appointed by state officials or the legislature; (2) the organization's budget is approved by its governors and not by any state official; (3) the organization does not receive any funding from the state treasury; and (4) bar employees do not participate in any of the benefit plans offered by the State of Wisconsin to its employees."

Respondent prevailed and retained its bulk mailing privileges on the basis that it is not a governmental entity.

6. Contrary Indicators of Immunity

There are contrary indicators relating to whether Respondent is an arm of the state.

On the one hand, the Wisconsin Supreme Court has ruled on various bar related issues and it has supervised some of its activities. Such indicators are related in the District Court's decision granting summary judgment. (App. 7a-9a).

On the other hand, Respondent operates as an independent entity with little or no state control over its activities. Thus, it conveys real estate and disposes of personal property in its own name; it holds and disburses its own funds; it is given no appropriations from the state's general revenues; it has the independent power to borrow money, to buy and sell bonds, and to incur other evidence of indebtedness; and its own debts and expenses are satisfied out of bar dues and revenues from its various services. (R.510) ¶ 66.

Respondent's employees are not classified as state employees and Respondent does not follow any of the various personnel rules and regulations governing state employment even though it has never been told by the Wisconsin Supreme Court that it is free to disregard them. (R. 510) ¶s 63-64.

Respondent is autonomous in fiscal and budgetary matters and thus does not follow any of the procedures mandated for all other state entities, again even though it has never been told by the Wisconsin Supreme Court that it is free to disregard those procedures. (R. 510) ¶s 60-62.

Other indicia showing that Respondent does not operate as a state entity are too numerous to be recited here. They are more fully set forth in Petitioner's Statement of Undisputed Facts In Opposition to Defendant's Second Motion for Summary Judgment. (R. 510) ¶s 60-63.

C. Course of Proceedings Below

1. Nature of the Case

Petitioner Crosetto and several other State Bar members filed their action under 42 U.S.C. § 1983 on May 19, 1988, against Respondent State Bar, its Executive Director, and the individual members of the Wisconsin Supreme Court. (Complaint, R. 2)[4] The District Court's jurisdiction was based on 28 U.S.C. § 1343(a)(3).

As amended, the complaint (R127) alleges that Respondent has violated Petitioner's rights under the First and Fourteenth Amendments to the United States Constitution by, inter alia, forcing him to financially support LAWPAC, its political action committee; by forcing him to support other bar activities which are not constitutionally mandated; by maintaining an unconstitutional dues reduction-arbitration plan; by taking away his property and liberty without due process of law; and by not maintaining constitutionally mandated time-keeping, record-keeping, and auditing practices.

As a remedy, Petitioner seeks declaratory and injunctive relief and legal money damages of about $1,500-$2,000.[5] Petitioner has asked for a jury trial regarding all genuine issues of disputed fact.

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[4]Those other plaintiffs are no longer parties to this litigation. For purposes of clarity, the singular term "Petitioner" is used herein even though several other plaintiffs originally were part of this action.

[5]Petitioner earlier requested class certification on behalf of himself and all other similarly situated State Bar members and compensatory and punitive damages on their behalf. All money claims on behalf of any other State Bar members were dropped before the District Court and Petitioner has dropped his request for class certification.

Petitioner also contends that he is a prevailing party because of his success in bringing about major improvements in Respondent's time-keeping, record-keeping, and auditing practices—a success which is evidenced by Respondent's admission that it fired one of its employees in part because of the abuses uncovered in this litigation. (R. 510) ¶ 17.

The action was filed in the United States District Court for the Western District of Wisconsin where it was assigned to Federal Judge Barbara B. Crabb. She subsequently recused herself *sua sponte* because of her membership in the State Bar. R. 86. Federal Judge Stanley J. Roszkowski of the Northern District of Illinois was then assigned to the case by special designation. R. 87. This case has always remained a Western District of Wisconsin case.[6]

2. Respondent's Representations That It Would Not Raise A Sovereign Immunity Defense

Respondent on three separate occasions has represented that it would not assert a sovereign immunity defense. See Respondent's Response To Plaintiffs' Statement Of Material Undisputed Facts (R. 467) ¶s 6, 7 and 8.

It first did so at an August 1989 deposition when one of its attorneys stated: "To my understanding as I sit here today with respect to this lawsuit, and only this lawsuit, the issue of state agency will not be raised." One of Respondent's other attorneys represented at a February 1991 status conference before the Magistrate that Respondent would not raise this defense at any time in this litigation. The same attorney in a

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6The captions of the District Court's Orders (App. 3a, 17a) incorrectly describe this action as being before the "United States District Court for the Northern District of Illinois, Western Division." The correct title should read before the "United States District Court for the Western District of Wisconsin."

February 1991 letter to Petitioner's counsel stated: "We do not believe that the State Bar's status as a state agency has any relevance to this litigation." *Id.*

3. Petitioner's Challenges To The Dues Reduction-Arbitration Plan

Petitioner and Respondent in August 1991 entered into a Pretrial Order which stated, inter alia, that one of the disputed questions of law to be answered by the Court was: "Is the dues reduction plan set forth in SCR 10.03(5), and State Bar Bylaws adopted in response to that rule, constitutional on its face and/or as applied." R324, Tab B-2, ¶ 3.

Pursuant thereto, Petitioner in 1992 moved for injunctive and declaratory relief on the grounds that SCR 10.03(5) (App. 43a-44a), was unconstitutional, facially and as applied, because Respondent's dues reduction-arbitration plan, inter alia: (1), imposes an unlawful exhaustion requirement which requires State Bar members to submit their constitutional claims to arbitration against their will, and (2), contains an unlawful preclusion requirement.[7] (R. 374-375)

4. Before the Remand

The District Court dismissed the individual Justices of the Wisconsin Supreme Court as named Defendants on November 16, 1990, pursuant to their Motion to Dismiss. 771 F. Supp. 224 (1990).

The magistrate on August 24, 1992, addressed some, but not all, of Petitioner's constitutional challenges to SCR 10.03(5). 810 F. Supp. 966 (N.D. Ill. 1992). He ruled that some of the rules and bylaws were facially valid and that Petitioner's

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7Petitioner also asserted that the plan is unconstitutional on other grounds. Petitioner is not raising those challenges in this proceeding.

constitutional challenge to the fee calculation for fiscal year 1993 was not ripe because the calculation had not been reviewed by an impartial arbitrator. *Id.* at 37-44. The magistrate did not identify or rule on the merits on Petitioner's other constitutional challenges. His Report and Recommendation also stated that summary judgment should be granted on behalf of Respondent and Executive Director Smay.

The District Court on October 22, 1992, denied Petitioner's motion for declaratory relief on the ground that it was "moot." R. 384. At the same time, it adopted the Magistrate's Report and Recommendation and granted summary judgment.

On appeal, Petitioner asserted before the Seventh Circuit, as he did before the District Court, that he was entitled to injunctive and declaratory relief because Respondent's July 1, 1992, dues reduction plan was unconstitutional for the reasons set forth at p. 11, ante. Respondent maintained that the plan was constitutional and stated that it had recently been amended, effective July 1, 1993, so that "it more closely follows the language of *Keller.*"[8]

The Seventh Circuit denied injunctive and declaratory relief without addressing these specific claims. It also affirmed the dismissals of Smay and the Justices of the Wisconsin Supreme Court, but raised sua sponte the question of whether Respondent is a state entity and entitled to sovereign immunity under the Eleventh Amendment. App. at 32a, n. 10.

It remanded that issue and stated that the District Court "should consider the extent of control exercised over the Bar by the Wisconsin Supreme Court or the state at large" and that it also should decide whether "the Bar was acting as the agent of

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8Brief of Defendants-Appellees State Bar of Wisconsin and Stephen L. Smay to the Court of Appeals for the Seventh Circuit, pp. 32-33, n. 16.

the Court when it promulgated the rules in question." App. at 33a.

It added: "Also relevant is whether a judgment against the State Bar would be ultimately be paid by the state treasury." *Id.* But, it cautioned: "We hasten to note, however, that even when there is no risk to the state treasury, the state is immune when sued in its own name" and that:

> "Thus, even without any impact on the state's treasury, the district court must consider whether the Bar occupies the position of a public agency or official, necessarily forbidding any suit in federal court." App. at 34a.

The Seventh Circuit also suggested that the District Court consider whether Respondent waived any sovereign immunity defense when its attorneys repeatedly stated that this defense would not be raised. App. at 34a, n. 11.

Petitioner then filed a Petition For Writ Of Certiorari with this Court seeking review over (1), the dismissal of Petitioner's motion for declaratory relief; (2), the dismissal of the Wisconsin Supreme Court Justices as named defendants; (3), whether Respondent's Executive Director was entitled to qualified immunity; and (4), whether Respondent was barred from raising a sovereign immunity defense. Petition, p. i.

Respondent opposed the petition on the grounds that the Seventh Circuit had properly: (1) remanded this matter for a determination of whether subject matter jurisdiction extends to claims against Respondent; (2), determined that Executive Director Smay was entitled to qualified immunity; and (3), dismissed Petitioner's motion for declaratory relief. Brief in Opposition, p. i.

The Petition For A Writ Of Certiorari was denied. 114 S.Ct. 2138 (1994).

5. After the Remand

Respondent on August 25, 1994, moved for summary judgment on the ground, inter alia, that it is a state agency; that it is entitled to sovereign immunity; and that the federal courts thus lack subject matter jurisdiction. (R. 434)

In response to that defense, Petitioner on February 28, 1995, moved to supplement the complaint by naming as nominal defendants the individual members of Respondent's Board of Governors—who were then nominal defendants in *Thiel v. State Bar of Wisconsin*, 94 F.3d. 399 (7th Cir. 1996)—and by seeking equitable relief against them pursuant to *Ex parte Young*, 209 U.S. 123 (1908). (R. 458)

The proposed supplemental complaint also claimed that Respondent's dues reduction-arbitration plan was unconstitutional for the reasons set forth at p. 11, ante. (R. 458) ¶s 191-192.

The proposed complaint also stated that Petitioner would drop all money claims if his constitutional challenges were addressed on the merits and if his prevailing party claims were submitted to a jury. (R. 458) ¶ G.

The District Court on May 1, 1995, denied the motion on the grounds that it would add 46 new parties (i.e., the members of Respondent's Board of Governors); that it would add a "completely new claim that is dissimilar to the issues remaining, thus expanding the scope of this lawsuit;" that this would require "significant additional preparation on the part of the defendant, and would impose a greater burden on this court; and that Petitioner's challenges to the dues reduction plan "were not appropriately a part of this lawsuit." App. 19a-20a. It therefore stated that Petitioner should intervene in *Thiel*, which was then pending in the Western District of Wisconsin, if he wanted his constitutional challenges heard, 20a. In doing

so, the District Court did not address, or even mention, that Petitioner would drop all money claims if the merits of his constitutional challenges were addressed.

Petitioner on March 3, 1995, moved to strike Respondent's sovereign immunity defense and he on March 13, 1995, moved for partial summary judgment on whether Respondent had waived that defense after its attorneys repeatedly had dropped it. (R. 460, 462)

The District Court on December 15, 1995, granted Respondent's motion for summary judgment on the ground that it is a state entity and hence entitled to sovereign immunity, an issue it found had not been waived. App. 3a-16a.

The Seventh Circuit on September 17, 1996, summarily affirmed the District Court's dismissal. App. 1a-2a It ruled that Respondent just recently had been found to be a state entity by another Circuit Court panel in *Thiel.* It affirmed the dismissal of Petitioner's complaint amendment because: "Amendment would have been inconsistent with our mandate, which required the resolution of one specific issue." App. 2a.

REASONS FOR GRANTING THE WRIT

"Is Justice Irrelevant "

Justice Stevens has posed this question in addressing the doctrine governing sovereign immunity under the Eleventh Amendment. Stevens, Is Justice Irrelevant Nw. U.L. Rev. 1121, 1124-1125 (1993).

That also is the same question posed here because Petitioner has spent over eight years in the federal courts, during which time one procedural barrier after another has been erected to avoid ruling on the merits of his claims and his status as a prevailing party.

Respondent's resurrected sovereign immunity defense is the last and, without this Court's review, final barrier. Respondent has raised this defense even after stating on three separate occasions that it would not do so and even after representing to the Postal Service: "The bar is not a governmental entity." (Emphasis in original.)

Petitioner on the remand tried to respond to this resurrected defense by naming as nominal defendants the individual members of Respondent's Board of Governors in order to counter Respondent's claim that the federal courts lack subject matter jurisdiction. The Court of Appeals, however, ruled that Petitioner's motion to that effect was barred under the terms of its mandate. App. 2a.

Its ruling runs roughshod over Rule 1's command that the Federal Rules of Civil Procedure are to be construed "to secure the just, speedy, and inexpensive determination of every action." Kicking Petitioner out of court after eight years and telling him that he must start anew if he wants his legal rights vindicated at this late date—merely because nominal defendants have not been added to this action—represents the very antithesis of this command and it invites comparison to *Jarndyce v. Jarndyce* (Charles Dickens, Bleak House (1853)).

Its ruling also is manifestly unjust because it prevents Petitioner from being declared a prevailing party because of his hard earned success in getting Respondent to improve its woeful record-keeping, time-keeping and auditing practices—one of the central issues in this litigation. Indeed, Respondent itself has acknowledged Petitioner's success by firing one of its employees in part because of the abuses uncovered here.

But, the issues before this Court are far broader than Petitioner's individual complaint. The constitutional issues raised herein—first raised in 1992 before the District Court and

then in 1993 before the Seventh Circuit—affect all of Wisconsin's other 18,000 or so attorneys. In addition, the Seventh Circuit's decision that payment from the state treasury is no longer a critical criteria in resolving sovereign immunity questions is now being applied in all other cases arising within its jurisdiction.

For the reasons stated below, Petitioner respectfully submits that this Court should grant review and correct this situation. Such a review also would show that justice is relevant.

I. There Is A Direct Conflict Between The Seventh Circuit Below And The First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, And Eleventh Circuits On Whether A Claimed State Entity Is Entitled To Sovereign Immunity When A Judgment Against It Does Not Come From The State Treasury

The Circuit Courts are deeply split on whether payment from a state's treasury remains a critical criteria in determining whether an entity is entitled to sovereign immunity under the Eleventh Amendment.

The minority view is taken by the Seventh Circuit which ruled here that sovereign immunity can be granted "even when there is no risk to the state treasury . . .." App. at 33a. The District Court on the remand thus ruled that because Respondent is an agency of the state under other criteria, "This court need not consider whether a judgment against the Bar would impact the state treasury." App. 9a-10a. The Seventh Circuit summarily affirmed the District Court's ruling. App. 1a-2a.

The Seventh Circuit in *Ruehman v. Sheahan*, 34 F.3d. 525, 528 (7th Cir. 1994) reiterated: "A drain on the state treasury is not a necessary condition to an affirmative answer" as to whether an entity is entitled to sovereign immunity under the Eleventh Amendment. It upheld that principle in *Thiel* when it

stated that its analysis was supported by *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1124 (1996). The court added:

> "we held in *Crosetto* that the effect on the state treasury was the least important of the three factors, and would be irrelevant if the first two [which relate to control and agency] weigh in favor of Eleventh Amendment immunity." 94 F.3d. at 401.

The Tenth Circuit in *Esparza v. Valdez*, 862 F.2d. 788, 795 (10th Cir. 1988), also ruled:

> "even if we could find little or no fiscal impact on the state from plaintiffs' suits, the financial impact on the state does not appear to be the predominant factor in Eleventh Amendment analysis."

These rulings are in direct conflict with the majority of other Circuit Courts which have addressed this issue.

The First Circuit in *Metcalf & Eddy v. P. R. Aqueduct and Sewer Authority*, 991 F.2d. 935, 939-940, (1st Cir. 1993), set forth a sevenfold test for determining whether sovereign immunity can be granted, with payment from a state's treasury being the single most important criteria.

The Second Circuit in *Mancuso v. New York State Thruway Authority*, 86 F.3d. 239, 293 (2nd Cir. 1996), cert. denied, (Nov. 18, 1996) (No. 96-381) held that payment from a state treasury was one of the six (6) criteria used to determine whether sovereign immunity can be granted and added: "The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused." *Id.* at 293. The court referred to *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S.Ct. 394, (1994), and ruled: "Although *Hess* involved a bi-state entity, we nevertheless believe that it is the proper starting place for our Eleventh Amendment inquiry in this case." *Id.* at 293. It added:

> "The parties' suggestion to the contrary notwithstanding, the Supreme Court's decision in *Seminole Tribe v. Florida*, ___ U.S. ___, 116 S. Ct. 1114, 134 L.Ed. 252 (1996), does not alter our analysis here." *Id.* at 293, n. 1.

The Third Circuit uses a three-pronged test for determining if sovereign immunity can be granted, one of which centers on whether:

> "payment of the judgment would come from the state (this includes three considerations: whether the payment will come from the state's treasury, whether the agency has sufficient funds to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts)." *Christy v. Pennsylvania Turnpike Com'n*, 54 F.3d.1140, 1144 (3rd Cir. 1995), cert. denied, 116 S. Ct. 340 (1995).

The Fourth Circuit in *Gray v. Laws*, 51 F.3d. 426, 433 (4th Cir. 1995), reviewed *Hess* and held:

> "a determination that the state treasury will be liable for a particular judgment is largely, if not wholly, dispositive of entitlement to Eleventh Amendment immunity in the single state context, as it is in the multistate context." 115 S.Ct. at 394."

More recently, the Fourth Circuit ruled in *Harter v. C. D. Vernon*, 1996 U.S.L.W. 673953 (4th Cir.), (Nov. 22, 1996), that "the most important factor is whether the state treasury will pay any resulting judgment" and that:

> "*Hess* makes clear that the impact on the state treasury is generally determinative when the state will not have to pay for a judgment." The court rejected Appellant's claim that *Seminole Tribe of Florida* dictates a contrary result because:

> "*Seminole Tribe* held Congress has no power under Article III of the Constitution to abrogate the Eleventh Amendment immunity of a state; the case had nothing to do with who the Eleventh Amendment applies to."

The Fifth Circuit has ruled: "the most significant factor in assessing an entity's status is whether a judgment against it will be paid with state funds." *McDonald v. Board of Miss. Levee Comm'rs.*, 832 F.2d. 901, 907 (5th Cir. 1987). See also *Delahoussaye v. City of New Iberia*, 937 F.2d. 144, 149-150 (5th Cir. 1991).

The Sixth Circuit has ruled: "[T]he most important factor in resolving this question, however, is whether any monetary judgment would be paid out of the state treasury." *Hutsell v. Sayre*, 5 F.3d. 996, 999 (6th Cir. 1993), cert. denied, 114 S.Ct. 1071 (1994).

The Eighth Circuit in *Hadley v. North Ark. Community Technical College*, 76 F.3d. 1437, 1439, (8th Cir. 1996), petition for cert. filed, 65 U.S.L.W. 3054 (U.S. June 24, 1996) (95-2060) reviewed *Hess* and concluded:

> "we adhere to the test that we instructed the district court to apply on remand, which requires that we 'examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state. Courts typically look at the degree of local autonomy and control and most importantly whether the funds to pay any award will be derived from the state treasury'." (Citations omitted.)

The Ninth Circuit applies a five-part test which centers on "whether a money judgment would be satisfied out of state funds," as it has ruled: "State liability for money judgment is the single most important factor in determining whether an entity is an arm of the state." *Doe v. Lawrence Livermore Nat.*

Laboratory, 65 F.3d. 771, 774 (9th Cir. 1995), cert. granted, 64 U.S.L.W. 3837 (U.S. June 17, 1996) (95-1694).

The Eleventh Circuit in *Jackson v. Georgia Dept. of Transp.*, 16 F.3d. 1573, 1577, (11th Cir. 1994), cert. denied, 115 S.Ct. 320 (1994), ruled that the "general test" for determining sovereign immunity:

> "is whether the relief sought against the nominal defendant would in fact operate against the state, especially by imposing liability damages that must be paid out of the public fisc."

The court added: "Moreover, this court has previously reasoned that Eleventh Amendment immunity applies only if the judgment must, under all circumstances, be paid out of state funds." (Emphasis in original). *Id.* at 1577.

This direct conflict between the Seventh Circuit and the majority of Circuit Courts centers on a fundamental principle of federalism which goes to the very core of the Eleventh Amendment; i.e., whether a claimed state entity is entitled to sovereign immunity when a money judgment against it will not come out of the state treasury.

Petitioner believes that the majority view adopted by the Circuit Courts is in accord with *Hess* where a majority of this Court (Justices Blackmun, Stevens, Souter, Kennedy, and Ginsburg, J.J.) ruled that sovereign immunity turns on respect for a state's sovereignty and whether a judgment will come out of the state treasury. The majority stated "the impetus for the Eleventh Amendment" was "the prevention of federal court judgments that must be paid out of a state treasury" and that: "Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations (citations omitted)." 115 S.Ct. at 404.

It thus ruled that the proper focus is on losses and debts and that:

> "If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise When the answer is 'No'—both legally and practically—then the Eleventh Amendment's core concern is not implicated." *Id.*, at 406.

That is the same question presented here. And, like *Hess*, the answer is "No" because a money judgment of about $1,500-$2,000 most certainly will not come out of the state's general treasury. Respondent has a $500,000 line of credit with its own bank; about $217,000 in bonds which it purchased; about $350,594 reserved for its building fund; and unrestricted cash assets of about $115,194. (R. 127) ¶ 44. Hence, Respondent has more than enough assets under its own name to pay for such a small judgment.

The Seventh Circuit here cited *Seminole Tribe of Florida* in support of its contrary view. App. at 2a. There, the majority (Rehnquist, C.J., O'Connor, Scalia, Kennedy and Thomas, J.J.) stated: "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." 116 S.Ct. at 1124. The majority added: "The Eleventh Amendment does not exist solely to prevent federal court judgments that must be paid out of a State's treasury," *Id.* at 1124. The Seventh Circuit apparently assumes these statements mean that it no longer is necessary to determine whether a judgment will come out of the state treasury.

However, that conclusion does not necessarily follow. *Seminole Tribe of Florida* centered on the Indian Commerce Clause, U.S. Const. art. 1, § 8, C1.3, and Congress' ability to regulate it. Hence, the majority there never had to decide whether *Hess*, which turned on the Compact Clause, should be overruled and whether payment from the state treasury remains

a needed criteria in determining whether sovereign immunity can be granted.

Only this Court, then, can clarify how *Hess* and *Seminole Tribe of Florida* are to be interpreted when read together.

Review thus should be granted so that this important question—which goes to the core of the Eleventh Amendment—can be answered and thereby bring about the end of the Circuit Court split which presently exists.[9]

II. This Court Has Granted Certiorari And Now Has Pending Before It A Similar Sovereign Immunity Question

The need for review is further shown by this Court's grant of certiorari and holding of oral argument on December 2, 1996, in *The Regents of the University of California, et al., v. John Doe, et al.*, No. 95-1694, which centers on whether an otherwise "arm of the state" loses its sovereign immunity if a monetary judgment is paid by the federal government or other third party, as opposed to being paid out of the state treasury.

The facts here are not exactly the same because there is a dispute whether Respondent is a governmental agency (it after all has admitted that it is not) and because there is no legal liability on the part of the State if it is not. In addition, this case does not involve possible reimbursement from some outside source such as the federal government. Furthermore, that case arises in a higher education context and the Court's decision may be limited to those facts. Hence, there is no guarantee that the Court's decision there will automatically be applied here.

9Petitioner maintains that the District Court erred in finding that Respondent had not waived its sovereign immunity defense and that it is an arm of the state. If review is granted, Petitioner will argue these points in greater detail.

Nevertheless, the two cases are closely connected regarding the fundamental issue of federalism raised in both proceedings; i.e., whether sovereign immunity can be granted under the Eleventh Amendment if a money judgment does not come out of the state treasury.

This Court therefore should grant review here, just as it has granted review there.

III. Fairness And Justice Dictate That Petitioner's Prevailing Party Claim Should Not Be Dismissed Because Of The Seventh Circuit's Decision Which Prohibited Petitioner From Adding Nominal Defendants To The Complaint To Counter Respondent's Lack Of Subject Matter Jurisdiction Claim

The Seventh Circuit ruled that Petitioner was prohibited on the remand from amending (or supplementing) the complaint because: "Amendment would have been inconsistent with our mandate which required the resolution of one specific issue." App. 2a.[10]

This flat-out, ironclad prohibition on any complaint amendment to counter Respondent's resurrected sovereign immunity defense, which it initially dropped in 1989, is contrary to *Foman v. Davis* 371 U.S. 178, 182 (1962) which held:

> "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

10The Court also stated that the District Court did not abuse its discretion in denying the amendment because it was precluded under its mandate. App. at 2a. However, since the Seventh Circuit ruled that its mandate prohibited any such amendment, the District Court had no such discretion in the first place.

That is the exact situation here because the Seventh Circuit, with no explanation whatsoever, precluded Petitioner from having the merits of his claims addressed only because of the technicality of not having the individual members of Respondent's Board of Governors named as nominal defendants. Those members were nominal parties in *Thiel*, a matter over which judicial notice can be taken because the Certificate of Interest filed in that case lists them all. Furthermore, their addition as parties would not entail any additional discovery[11] or expose them to any financial risk (Petitioner only seeks equitable relief against them). Their addition as parties thus is a routine, ministerial task.

Hence, "It is too late in the day . . ." for "decisions on the merits to be avoided on the basis of such mere technicalities" because:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman v. Davis*, 371 U.S. at 181. (citation omitted)

Here, there was no "misstep" by Petitioner's counsel since he reasonably relied on Respondent's repeated representations between 1989-1994, set forth at pp. 10-11, ante, that it would not raise a sovereign immunity defense and that the federal courts had subject matter jurisdiction. That is why Petitioner in 1995 moved for such an amendment only after Respondent in 1994 resurrected this defense and moved for summary judgment on that basis.

11Petitioner has repeatedly stated that this record is fully complete regarding the issues in dispute and that he would not conduct any further discovery if his amendment were to be granted.

The motion also was aimed at ensuring that the federal courts retain subject matter jurisdiction (which Respondent never disputed between 1989-1994) over whether Petitioner is a prevailing party because of his success in bringing about major improvements in Respondent's sorry record-keeping, time-keeping, and auditing practices.

That is why Petitioner has asked that he be allowed to name nominal defendants to at least carry forward this part of his case even if his other request for equitable relief is denied. See Plaintiffs-Appellants' Brief to the Court of Appeals at p. 27, n. 10.

The situation here is almost identical to *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952), which held that it was proper to add parties to counter a defendant's belated claim that proper parties had not been joined because:

> To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration--the more so since, with the silent concurrence of the defendant, the original plaintiffs were deemed proper parties below. Rule 21 will rarely come into play at this stage of a litigation. We grant the motion in view of the special circumstances before us.

Similar "special circumstances" most certainly exist here since Respondent between 1989-1994 never claimed that proper parties had not been joined for purposes of subject matter jurisdiction, an issue it ceded over and over again throughout that time.

The Seventh Circuit's refusal to allow such a necessary amendment is also contrary to *Ingraham v. Wright*, 498 F.2d. 248, 252 (5th Cir. 1994) where, under like circumstances, the court ruled that "fairness and efficient judicial administration

justify the addition of the individual school board members as parties . . .."

Accordingly, review is needed to correct the manifest injustice caused by the Seventh Circuit's ruling.

IV. The Courts Below Clearly Erred In Not Addressing The Merits Of Petitioner's Claims Which Were First Raised In 1992 And Which Are Covered By The Pretrial Order

Petitioner maintains that by virtue of *Keller v. State Bar of California*, 496 U.S. 1 (1990), Respondent is clearly prohibited under 42 U.S.C. 1983 from insisting that Petitioner must exhaust state remedies by first presenting his constitutional challenges to arbitration before they can be heard in federal court. *Felder v. Casey*, 487 U.S. 131 (1988); *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982).

The plan also is unconstitutional under *Keller* because it contains an unlawful preclusion requirement contrary to *Teachers v. Hudson*, 475 U.S. 292, 307, n. 1 (1996).

These challenges are covered by the Pretrial Order which asks: "Is the dues reduction plan set forth in SCR 10.03(5) and State Bar Bylaws adopted in response to that rule, constitutional on its face and/or as applied." (R. 324) Tab B-2, ¶ 3.

Pursuant thereto, Petitioner in 1992 moved for injunctive and declaratory relief before the District Court on the grounds, inter alia, that Respondent's dues reduction, arbitration plan, which was established under SCR 10.03(5), was unconstitutional, facially and as applied, for these reasons. (R. 375)

The District Court therefore clearly erred when it stated that the complaint amendment represented a "completely new claim

that is dissimilar to the issues remaining, thus expanding the scope of this lawsuit." App. 19a-20a.

Its error can best be seen by simply comparing Petitioner's verbatim 1992 claims before the District Court with his verbatim 1995 amendment. Such a comparison reveals the following:

Petitioner's 1992 Memorandum In Support Of Plaintiffs's Objections To The Magistrate's Report and Recommendation (R. 375) (pp. 12-13), stated that the dues reduction-arbitration plan is unconstitutional because:	Petitioner's 1995 Amendment (R. 458), ¶s 190-191, states that "the State Bar's current dues reduction plan which was amended effective July 1, 1993, is constitutionally defective . . . because:
"1. Defendants have failed to meet their burden of proof that all of their chargeable activities are justified by compelling state interests which cannot be achieved through alternative and less restrictive means.	Defendants have failed to meet their burden of proving that each chargeable activity used in establishing the size of its dues reduction is justified by compelling state interests which cannot be supported by alternative and less restrictive means.
2. Defendants have failed to meet their burden of proof under *Keller, supra,* that all of their chargeable expenses are 'germane' to either regulating the legal profession or improving the delivery of legal services.	[The plan] does not follow the 'guiding standard' set forth in *Keller* . . . (i.e., that chargeable expenses must relate to either regulating the legal profession or improving the delivery of legal services.)

3. It gives preclusive effect to any arbitration award issued under its procedures.	It gives preclusive effect to any arbitration awards issued thereunder.
. . .	
The plan is also unconstitutional because of its unconstitutional exhaustion requirement. For the law is clear: Civil rights claimants proceeding under Section 1983 cannot be forced to first avail themselves of state administrative remedies before bringing their action in federal court.	7. It forces State Bar members to go to arbitration before they can bring any of their constitutional claims in federal court.
. . .	
it failed to warn that objectors seeking arbitration are expected to waive any de novo review of the arbitrator's award because of its preclusive effect . . ."	It fails to warn prospective State Bar objectors requesting arbitration that by proceeding under Section 788, Wis. Stats., they may be waiving their right to obtain de novo review of any such award.
. . .	

This comparison establishes that Petitioner's pending constitutional challenges have been part of this litigation since 1992 and that their resolution on the merits would not expand its scope by one iota.

Petitioner in this proceeding, however, is only asking for a determination relating to those parts of Respondent's plan relating to arbitration. Those other challenges are not before the Court.

Review therefore is needed to vindicate the rights established under *Keller* and the rights of Wisconsin's approximately other 18,000 attorneys who have been subjected to these requirements since July 1, 1992.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 14, 1996

APPENDIX A

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
Submitted September 16, 1996*

September 17, 1996.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

JOHN CROSETTO, et al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Western District of Wisconsin.
Nos. 96-1118 & 96-1211 v.	)	
STATE BAR OF WISCONSIN, Defendant-Appellee.	)	No. 88-C-433 Stanley J. Roszkowski, Judge.

Order

A prior decision, 12 F.3d 1396 (1993), affirmed the bulk of the district court's conclusions in this case but remanded a single issue for reconsideration: "whether the suit against the Wisconsin State Bar Association is properly considered a suit against the state *qua* state." On remand, the district court held

that the State Bar is indeed part of the state and therefore dismissed under the eleventh amendment what remained of the suit.

After the appellate briefing in this case had been completed, another panel of this court held, in *Thiel v. State Bar of Wisconsin*, No. 95-3442 (7th Cir. Sept. 3, 1996), that the State Bar is part of the state, and that a federal court accordingly lacks jurisdiction to entertain a suit against it for either damages or prospective relief. See *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1124 (1996) ("the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment"). The decision in *Thiel* resolves this case, too, adversely to the appellants.

Only one other matter calls for comment. After we remanded the case, plaintiffs sought to amend their complaint to drop the request for damages, to add defendants in order to facilitate claims under *Ex Parte Young*, 209 U.S. 123 (1908), and to add additional theories of liability. The district court denied this motion for two principal reasons: First, it would fundamentally alter the litigation many years after its inception; second, it would make this case a close cousin to *Thiel*, without good reason, for the plaintiffs in this case could take advantage of any victory in *Thiel*. This decision did not abuse the discretion a district court possesses over such matters. Amendment would have been inconsistent with our mandate, which required the resolution of one specific issue. And now that *Thiel* has been decided--adversely to the plaintiffs on all issues, not just the eleventh amendment--there is even less reason to go back to Square One.

AFFIRMED

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* Originally scheduled for oral argument, this case was taken off the calendar and submitted for prompt decision after another panel released an opinion resolving the principal issue.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

JOHN CROSETTO, et al.,	)	
	)	
Plaintiffs,	)	
	)	CASE NO. 88 C 433
v.	)	
	)	
STATE BAR OF WISCONSIN,	)	
	)	
Defendant.	)	

ORDER

This matter comes before the court on the defendant's Motion for Summary Judgment. For the reasons that follow, defendant's motion is granted.

Background

In 1988, plaintiffs brought this action pursuant to 42 U.S.C. § 1983 against the State Bar of Wisconsin, the Bar's executive director, Stephen Smay, and the Justices of the Wisconsin Supreme Court. They challenged the mandatory bar in Wisconsin and certain activities conducted by the bar. The

complaint sought compensatory and punitive damages, as well as declaratory and injunctive relief. On November 16, 1990, the claims against the Justices of the Wisconsin Supreme Court were dismissed. Crosetto v. Hefernan, 771 F. Supp. 224 (W.D. Wis. 1990).

On October 22, 1992, this court granted the defendants' motion for summary judgment. The Seventh Circuit affirmed that order in all respects except one. Crosetto v. State Bar of Wisconsin, 12 F.3d 1396 (1993). The Court questioned whether the federal courts had jurisdiction over the State Bar under the Eleventh Amendment,[1] and thus did not reach the merits of the dismissal of the claims for past damages against the bar. Id. at 1402. The Court stated:

> We agree that a suit against a state bar association, as a general matter, may constitute a suit against the state for sovereign immunity purposes. Whether the

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[1] "[I]n the absence of consent a suit in which the state or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." Papasan v. Allain, 478 U.S. 265, 276 (1986), citing, Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984). This bar exists whether the relief sought is legal or equitable. Id.

> Wisconsin State Bar, in particular, is vested with sufficient state characteristics to qualify for sovereign immunity is a factual question, however, that cannot be answered on the record before us. We therefore vacate that part of the district court's decision holding for the State Bar of Wisconsin, and remand this case for a determination of the State Bar's sovereign status.

Id.

The Court went on to say that if after an analysis of the facts, this court "finds that a suit against the Wisconsin State Bar is a suit against the State, then unless one of the recognized exceptions to a state's sovereign immunity applies here, [the district court] must dismiss all of Plaintiffs' claims against the Wisconsin State Bar for lack of subject matter jurisdiction." Id. at 1402-03.

Discussion

A summary judgment motion will be granted only if the pleadings and supporting documents indicate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Fitzsimmons v. Best, 528 F.2d 692, 694 (7th Cir. 1976). The dispute of a material fact is

genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson, 477 U.S. at 248. However, the district court is not required to evaluate every conceivable inference that can be drawn from the evidence, but only those inferences that are reasonable. Parker v. Federal Nat'l Mortgage Ass'n, 741 F.2d 975, 980 (7th Cir. 1984).

This court has been directed by the Seventh Circuit to determine whether the State Bar is an agency of the state of Wisconsin. In Crosetto, the Court outlined the relevant factors to be considered in determining the Bar's sovereign status. 12 F.3d at 1402. First, the court should consider the extent of control exercised by the Wisconsin Supreme Court over the Bar. Id. If the Wisconsin Supreme Court had the ultimate authority to adopt and enforce the Bar's rules in question, then a suit against the Bar challenging those rules would not be that different than a suit directly against the Supreme Court. Id. Second, this court should consider whether the Bar has a role completely defined by the Wisconsin Supreme Court. Id. That

is, "whether the Bar was acting as an agent of the Wisconsin Supreme Court when it promulgated the rules in question." Id. And finally, this court should consider whether a judgment against the State Bar would ultimately be paid by the state's treasury. Id. However, if the first two factors indicate that the Bar is an agent of the state, then this factor is irrelevant because the state is immune to suit even where there is no impact to the state treasury. Id. (citing Zych v. Wrecked Vessel Believed to be the Lady Elgin, 960 F.2d 665, 669 (7th Cir. 1992); Green v. Mansour, 474 U.S. 64, 72 (1985)).

An analysis of the facts indicates that the Wisconsin Supreme Court has "ultimate control over the Bar." The Bar was created by the Court in 1956 pursuant to its constitutional authority over the administration of justice. Wis. Const. Art. VII; SCR 10.02(1). See also, Lathrop v Donahue, 10 Wis. 2d 230, 243 (1960). The Court has provided for the organization and government of the association. SCR 10.01(2). The Court requires the Bar to include in membership dues the amount necessary to pay the costs of the Board of Attorneys of

Professional Responsibility and the continuing legal education functions of the Board of Bar examiners. SCR 10.03(5)(a). The Court retains authority over any increase in bar dues. SCR 10.03(5). It limits the use of dues for ideological and political activities. SCR 10.03(5)(b). It requires the Board of Governors to procure an annual audit of the Bar's books. SCR 10.09(1). The Court sets the deadlines within which members must enroll and pay dues, and establishes the penalties for nonpayment of Bar dues. SCR 10.03(2), 10.03(6). The Court establishes the manner in which the Bar conducts its daily activities, establishes its governing bodies and offices, and defines their powers, functions and duties. SCR 10.04-.08. The Court has the ultimate authority to review amendments to the Bar's bylaws. SCR 10.05(4)(a)(8). Also, the Wisconsin Supreme Court has the exclusive, inherent power to take remedial action against the Bar on sufficient showing that the activities or policies of the Bar are not in harmony with the objectives of integration or are otherwise contrary to the public interest. In re Integration of the Bar, 5 Wis. 2d 618, 92 N.W. 2d 601 (1958). Furthermore,

under Wis. Stat. § 70.11(1), property owned by the Wisconsin State Bar is exempt from real and personal property taxation as property owned by the state, and the Bar also does not pay Wisconsin income or "sales tax."

The facts also indicate that the Bar "was acting as an agent of the Wisconsin Supreme Court when it promulgated the rules in question." The rule challenged here, SCR 10.03(5)(b), concerns the collection and use of mandatory dues. The Bar's authority to collect and use those dues are explicitly conferred and regulated by Supreme Court orders. The Supreme Court has the ultimate authority over SCR 10.03(5)(b), and has the sole authority to amend it. The Court has taken an active role in limiting the use of Bar dues for legislative, political or ideological activities.

Finally, because the first two factors compel the conclusion that the Bar is an agency of the state, this court need not consider whether a judgment against the Bar would impact the

state treasury.[2]

As the Court of Appeals noted in its opinion, other federal courts addressing this issue have found unanimously that state bars are entitled to sovereign immunity as agencies of the particular state. Crosetto, 12 F.3d at 1401-02 (citing Lewis v. Louisiana State Bar Ass'n, 792 F.2d 493 (5th Cir. 1986); Bishop

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[2]In Crosetto, the Seventh Circuit stated:

> We hasten to note, however, that even when there is no risk to the state treasury, the state is immune when sued in its own name. See Zych v. Wrecked Vessel Believed to be the Lady Elgin, 960 F.2d 665, 669 (7th Cir. 1992) (rejecting the notion that an absence of financial impact on the state is a per se pass from the Eleventh Amendments purview); see also Green v. Mansour, 474 U.S. 64, 72 (1985). Thus even without any impact on the state's treasury, the district court must consider whether the Bar occupies the position of a public agency or official, necessarily forbidding any suit in federal court. See Lewis, 792 F.2d at 497 (discussing Bates, 433 U.S. at 361, 97 S.Ct. at 2696; Will v. Michigan Dept. of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 2311 (1989) (Sovereign immunity forbids a suit against an individual or entity who occupies the position of a state office--even if there is no impact on state funds--just as if the state had been named directly as a party to the suit).

Crosetto, 12 F.3d at 1402.

v. State Bar of Texas, 791 F.2d 435 (5th Cir. 1986); Lupert v. California State Bar, 761 F.2d 1325 (9th Cir. 1986); Ginter v. State Bar of Nevada, 625 F.2d 829 (9th Cir. 1980); Doyle v. Oklahoma, 787 F. Supp. 189 (W.D.Okl. 1992)). See also Kaimowitz v. The Florida Bar, 996 F.2d 1151, 1155 (1993) ("The Eleventh Amendment prohibits actions against state courts and state bars."). In addition, in a well reasoned and persuasive opinion, Judge Shabaz of the Western District of Wisconsin recently held that the Wisconsin State Bar is immune from suit under the Eleventh Amendment. Thiel v. State Bar of Wisconsin, 95 C 0103-S.

The plaintiffs contend that even if the defendant is entitled to sovereign immunity, it has waived that defense. They assert that under Wisconsin law sovereign immunity is a matter of personal jurisdiction and thus can be waived by conduct, such as defending a case on the merits, without authorization from the state legislature. This argument is clearly misplaced. Whether or not sovereign immunity is a matter of personal jurisdiction in the state courts of Wisconsin is irrelevant. Under

Hans and its progeny, sovereign immunity deprives federal courts of subject matter jurisdiction over a case. Hans v. Louisiana, 134 U.S. 1 (1890). As the Seventh Circuit stated in Crosetto, if this court finds that the Bar is an agent of the state, then "all plaintiffs' claims against the Wisconsin State Bar" must be dismissed "for lack of subject matter jurisdiction." 12 F.3d at 1402-03 (emphasis added).

Sovereign immunity can be waived only under limited circumstances. Congress may abrogate the States' sovereign immunity in certain cases, or states may consent to suit in federal court. Port Auth. Trans-Hudson v. Feeney, 495 U.S. 299, 304 (1990). State officials can waive a state's sovereign immunity, but only if they are specifically authorized to do so by the state's constitution, statutes, or decisions. Estate of Porter v. State of Illinois, 36 F.3d 684, 690 (7th Cir. 1994) (citing Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459, 467 (1945). See also Silver v. Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986) ("[R]emoval by state officials of a suit containing state law claims to federal court

does not amount to waiver of Eleventh Amendment immunity unless those state officials are authorized to waive such immunity."). Thus, this court must look to the laws of Wisconsin to determine whether the State Bar had the authority to waive the State's sovereign immunity.

Under the Wisconsin Constitution, the legislature has the authority to direct by law the manner in which suits may be brought against the state. Wis. Const. Art. IV, § 27. This provision gives the state legislature sole authority to consent to suit. Cords v. Wisconsin, 214 N.W.2d 405, 409 (Wis. 1974); Forseth v. Sweet, 38 Wis. 2d 676, 689, 158 N.W.2d 370, 376 (1968) ("[The legislature] has the absolute right to proscribe the boundaries of its sovereign immunity."); Townsend v. Wisconsin Desert Horse Ass'n, 167 N.W.2d 425, 429 (Wis. 1969) ("It is for the legislature to declare pursuant to the mandate in sec. 27, Art. IV of the Wisconsin Constitution how and in what respect the state can be sued by a citizen."). The Wisconsin Supreme Court has interpreted Art. IV, § 27 as meaning that a state agency or officer may not waive the state's sovereign immunity

without specific authorization. Lister v. Board of Regents, 240 N.W.2d 610, 618 (Wis. 1976). Furthermore, principles of estoppel will not be applied to deprive a state of its right to sovereign immunity. Lister, 240 N.W.2d at 619.

There is no Wisconsin statute authorizing suits against the State Bar or giving the Bar authority to consent to suit in federal court. Although the Wisconsin Supreme Court has given the Bar the power to sue and be sued,[3] this does not give the Bar authority to consent to suit in federal court. In order to waive the Eleventh Amendment defense, a statute or constitutional provision must do so in explicit language, stating not "merely whether [the state] may be sued, but where it may be sued." Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241 (1985) (citing Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984)). "In order for a state statute or constitutional provision to constitute a waiver of

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[3]Wisconsin SCR 10.02(1) states in part: "The state bar may, for the purpose of carrying out the purposes for which it is organized, sue and be sued, enter into contracts, acquire, hold, encumber and dispose of real and personal property."

Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court." Id. at 241 (emphasis in original). Thus, even if Wisconsin SCR 10.02 (1) allows suits against the Bar in state court, it does not authorize the Bar to waive the State's sovereign immunity in federal court. Because there has been no legislative authorization to waive sovereign immunity, defendant is entitled to assert that defense in this case.

Plaintiffs further argue that since defendant did not raise the sovereign immunity defense in previous proceedings, it cannot raise it now. This argument is without merit. Because it is in the nature of a jurisdictional bar, sovereign immunity can be raised at any time, even after the state has defended a matter on the merits. Friendship Medical Center v. Yorke, 710 F.2d 1297, 1300 (7th Cir. 1983) ("[B]ecause the agency could have raised the [sovereign immunity] defense on appeal, there is no merit to the appellant's contention that IDPA waived the defense by defending on the merits instead of resting exclusively on the [Eleventh] Amendment."); Edelman v. Jordan, 415 U.S. 651,

678 (1974) ("[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.")

Conclusion

For the reasons stated, defendant's Motion for Summary Judgment is granted and the cause is dismissed.

ENTER:

Stanley J. Roszkowski /s/
STANLEY J. ROSZKOWSKI, JUDGE
UNITED STATE DISTRICT COURT

DATE: Dec. 15, 1995 /s/

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

JOHN CROSETTO, et al.,	)	
	)	
Plaintiffs,	)	
	)	CASE NO. 88 C 433
v.	)	
	)	
STATE BAR OF WISCONSIN,	)	
	)	
Defendant.	)	

ORDER

This matter comes before the court on the plaintiffs' Motion for Leave to Supplement the Complaint pursuant to Federal Rule of Civil Procedure 15(a). For the reasons that follow, leave to amend is denied.

Background

In 1988, Plaintiffs filed this suit raising constitutional challenges to Wisconsin's integrated bar, including the procedure used to calculate mandatory bar dues. In 1992, this court granted summary judgment in favor of the defendants on

all counts. Plaintiffs appealed, and the Seventh Circuit affirmed in part, reversed in part and remanded the case. The mandate from the Seventh Circuit leaves only a few issues remaining: whether this court has subject matter jurisdiction over a suit against the State Bar Association under the 11th Amendment; whether there was an effective waiver of sovereign immunity; whether a qualified immunity defense is available to the State Bar; and, if defendant is not entitled to any immunity, whether the plaintiffs are entitled to compensatory and punitive damages.

The plaintiffs now seek to amend the complaint by, inter alia, adding the individual members of the State Bar of Wisconsin's Board of Governors as defendants; dropping their request for compensatory and punitive damages for other State Bar members; and requesting declaratory and injunctive relief prohibiting the State Bar from enforcing the dues reduction-arbitration plan that has been in effect since July 1, 1993.

Discussion

Any time after a responsive pleading has been filed, a party

must seek leave from the court or consent of the adverse party to amend a pleading. Fed. R. Civ. P. 15(a). It is within the district court's sound discretion to grant or deny leave to amend at that point in the litigation. Perrian v. O'Grady, 958 F.2d 192, 194 (7th Cir. 1992). Pursuant to Rule 15(a), leave to amend should be freely given unless there is "undue delay, bad faith, dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment." Id. (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). Undue prejudice has been found when a proposed amendment would bring new claims and add new parties, and when it would require significant additional preparation. Conroy Datsun Ltd v. Nissan Motor Group, 506 F. Supp. 1051 (N.D. Ill. 1980); See also, Troxel Mfg. Co. v. Schwinn Bicycle, 489 F.2d 968 (6th Cir. 1973).

Plaintiffs' proposed amendments would add 46 new parties to this litigation. They would add a completely new claim that is dissimilar to the issues remaining, thus expanding the scope of

this lawsuit. Since this case was remanded, discovery has been conducted on the issues left open by the Seventh Circuit's opinion. At this point, adding new parties and substantially changing the theory upon which the case is based would undoubtedly require significant additional preparation on the part of the defendant, and would impose a greater burden on this court.

The current dues reduction-arbitration plan that the plaintiffs now seek to challenge was promulgated several years after the commencement of this lawsuit and is not appropriately a part of this lawsuit. Furthermore, the constitutionality of the current rules is the subject of a lawsuit, Thiel v. State Bar of Wisconsin, Case No. 95 C 103 S, now pending in the Western District of Wisconsin. That action seeks the same declaratory and injunctive relief as plaintiffs' proposed supplemental complaint. Since the relief sought in Thiel is declaratory and injunctive, plaintiffs will benefit from any relief granted. And if they so desire, they can seek to intervene in that case. Plaintiffs, therefore, will not be prejudiced by a denial of their motion.

Conclusion

This litigation has been pending for seven years. To add claims upon which this case proceeds at this point in time would be unduly prejudicial to the defendants. It is time to conclude this litigation, not change gears and proceed anew. Therefore, plaintiffs motion to amend is denied.

ENTER:

Stanley J. Roszkowski /s/
STANLEY J. ROSZKOWSKI, JUDGE
UNITED STATE DISTRICT COURT

DATE: May 1, 1995 /s/

APPENDIX D

In the

United States Court of Appeals
For the Seventh Circuit

No. 92-3899
JOHN CROSETTO, ET AL.,

Plaintiffs-Appellants,

v.

STATE BAR OF WISCONSIN, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Wisconsin
No. 88 C 433—Stanley J. Roszkowski, *Senior District Judge.*

ARGUED SEPTEMBER 29, 1993—DECIDED
DECEMBER 20, 1993

Before FLAUM, EASTERBROOK, and KANNE, *Circuit Judges.*

FLAUM, Circuit Judge. In this case Wisconsin lawyers, John Crosetto, Kenneth Doran, and Douglas Kammer ("Plaintiffs"), have alleged that the State Bar of Wisconsin, Stephen Smay

(the Executive Director of the Wisconsin Bar), and the Justices of the Wisconsin Supreme Court ("Defendants"), violated Plaintiffs' First Amendment rights by requiring Plaintiffs both to join the Wisconsin State Bar and to contribute money for certain political causes in order to practice law in the State. The district court granted Defendants' motion for summary judgment finding that Defendants acted in good faith and holding that Defendants were entitled to qualified immunity. Furthermore, the district court denied Plaintiffs' motion for a preliminary injunction, upholding the constitutionality of Wisconsin's integrated bar and compulsory membership dues. We affirm in part, vacate in part, and remand this case to the district court for a factual finding.

I. Background

The issue presented here is not wholly new to this court and we are mindful of the long history of litigation surrounding Wisconsin's mandatory bar rule. In 1943, the Wisconsin legislature enacted a bill directly that there "shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this state, and membership in the association shall be a condition precedent to the right to practice law in Wisconsin." Wis. Stat. § 256.31 (1943). Construing the statute to be merely advisory, the Wisconsin Supreme Court initially declined to integrate[1] the State's bar, and allowed the bar association membership to remain voluntary. *See Integration of Bar Case,* 244 Wis. 8, 11 N.W.2d 604 (1943); *In re Integration of the Bar,* 249 Wis. 523, 25 N.W.2d 500 (1946).

By 1956, the Wisconsin Supreme Court had become concerned that "too many lawyers have refrained or refused to join [the voluntary bar association], that membership in the

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[1]An integrated bar is one requiring both membership and the payment of dues as conditions of practicing law within the state.

voluntary association [had] become static, and that substantial minority of the lawyers in the state [were] not associated with the State Bar Association." *In the Matter of the Integration of the Bar,* 273 Wis. 281, 77 N.W.2d 602 (1956). The Court ordered integration of the State's bar on an interim basis, *id.* 77 N.W.2d at 604, and after a two year trial period, the Court permanently integrated the State's bar.

A significant portion of Wisconsin lawyers opposed the Wisconsin Supreme Court's decision and filed a lawsuit alleging that Wisconsin's integrated bar violated the First Amendment. This lawsuit ultimately reached the Supreme Court of the United States. *Lathrop v. Donohue,* 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961). In *Lathrop*, six justices employed a legitimate state interest test and concluded that Wisconsin's integrated bar did not violate a Wisconsin lawyers' First Amendment rights. But *Lathrop* hardly settled the opposition to Wisconsin's integrated bar. By the late 1970s, resistance to Wisconsin's integrated bar became so pronounced, as the State Bar became increasingly involved in advocating various political policies, that the Wisconsin Supreme Court decided to allow all attorneys who objected to the Bar's political expenditures to reduce their membership dues according to that portion of dues spent on the objectionable political activities. *See Matter of Discontinuation of Wis. State Bar,* 93 Wis.2d 385, 286 N.W.2d 601 (1980).

Unsatisfied by the Wisconsin Supreme Court's dues-reduction compromise, a Wisconsin lawyer filed a federal class action suit challenging the facial constitutionality of Wisconsin's integrated bar. *Levine v. Supreme Court of Wisconsin,* 679 F.Supp. 1478 (W.D. Wis. 1988) (hereinafter "*Levine I*"). In *Levine I,* the plaintiff contended that compulsory membership dues facially violate a Wisconsin lawyer's speech and association rights under the First Amendment. *Id.* at 1489. Alternatively, the plaintiff argued that the Bar's use of compulsory dues to fund political advocacy violated the First Amendment and that Wisconsin's

dues-reduction compromise failed to cure this defect. *Id.* at 1502. Without addressing the plaintiff's alternative argument, the district court declared that Wisconsin's mandatory bar membership rule and its Bar dues requirement facially violated all Wisconsin lawyers' First and Fourteenth Amendment rights. *Id.* The district court awarded the plaintiff both compensatory and punitive damages, and enjoined the State Bar's from enforcing its mandatory bar-membership rule. *Id.* In its analysis, the district court questioned the continued viability of *Lathrop*, the cornerstone upon which the defendant's legal arguments for an integrated bar rested. To comply with *Levine I*, the Wisconsin Supreme Court suspended enforcement of the mandatory membership rule. Following the victory in *Levine I*, the opposition lawyers filed the case here before us—*Crosetto v. State Bar of Wisconsin*—hoping to curb further the State's integrated bar.

The district court stayed all its proceedings pending the outcome of *Levine I*'s appeal which was then before the Seventh Circuit. Subsequently, we reversed *Levine I* on appeal, holding that *Lathrop* still controlled the constitutionality of integrated bars and allowed Wisconsin to enforce its integrated bar. *See Levine v. Heffernan*, 864 F.2d 457, 458 (7th Cir.1988) (hereinafter "*Levine II*").[2] After *Levine II*, the *Crosetto* district court lifted its stay and the parties briefed fully Plaintiffs' motion for class certification. Judge Crabb denied Plaintiffs' motion without prejudice and then recused herself, noting that as a member of the Wisconsin bar, she would be affected by the case's outcome. The Chief Judge of the Seventh Circuit designated Judge Roszkowski from the Northern District of Illinois, to preside over *Crosetto*. Thereafter, the proceedings of *Crosetto* were again stayed pending the decision from the United States Supreme Court in *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) (posing

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[2]Notwithstanding *Levine II* the Wisconsin Supreme Court continued its suspension of the bar integration rule until July 1, 1992.

questions regarding the constitutionality of California's integrated bar).

After the Court in *Keller* upheld California's integrated bar, the Wisconsin Bar began the process of re-integrating. In March 1991, the State Bar approved a petition to the Wisconsin Supreme Court to reinstate the State Bar as a mandatory organization. Following a public hearing, the Wisconsin Supreme Court reestablished the integrated bar, effective July 1, 1992, under a new set of Court rules and State Bar by-laws.[3]

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[3]*See* Wisconsin SCR 10.03(5)(b) and Wisconsin State Bar Bylaws, art. I, sec. 5. The newly-enacted Wisconsin Supreme Court Rule 10.03(5)(b) provides the following:

> 1. The state bar may use compulsory dues only for activities reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the state bar. Other activities must be supported by voluntary dues, user fees or other sources of revenue.
> 2. Prior to the beginning of each fiscal year, the state bar shall publish written notice of the activities that can be supported by compulsory dues and the activities that cannot be supported by compulsory dues. The notice shall indicate the cost of each activity, including all appropriate indirect expense, and the amount of dues to be devoted to each activity. The notice shall set forth each member's pro rata dues to be devoted to activities that cannot be supported by compulsory dues. The notice shall be sent to every member of the state bar along with the annual dues statement. A member of the state bar may withhold the pro rata portion of dues budgeted for activities that cannot be supported by compulsory dues.
> 3. A member of the state bar who contends that the state bar incorrectly set the amount of dues that can be withheld may deliver to the state bar a written demand for arbitration. Any such demand shall be delivered within 30 days of receipt of the members's dues statement.
> 4. If one or more timely demands for arbitration are delivered, the state bar shall promptly submit the matter to arbitration before an impartial arbitrator. All such demands for arbitration shall be consolidated for hearing. The costs of the arbitration shall be paid by the state bar.
> 5. In the event the decision of the arbitrator results in an increased pro rata reduction of dues for members who have delivered timely demands for

(continued...)

See In Matter of State Bar of Wisconsin: Membership, 169 Wis.2d 21, 485 N.W.2d 225 (1992).

Meanwhile, Plaintiffs' continued pressing their constitutional objections through this case, *Crosetto.* In *Crosetto,* Plaintiffs alleged that before *Keller,* (1) Defendants had forced Plaintiffs to financially support the State Bar's political and other legislative activities contrary to the First and Fourteenth Amendments, (2) confiscated Plaintiffs' property without due process of law, and after *Keller* (3) Defendants implemented a dues reduction plan that still failed the most recent pronouncements of the Supreme Court of the United States. In support of their allegations, Plaintiffs contend that among other things, Defendants commingled resources between the State Bar and its political action committee failed to keep adequate records so that dissenting bar members may obtain a proper refund, and used dues money for political activities unrelated to the regulation of the legal profession.

The Justices of the Wisconsin Court filed a motion to dismiss Plaintiffs complaint against them in that, as Justices, they were absolutely immune from suit for the quasi-legislative conduct, and further, that Plaintiffs lacked any immediate threat of injury. The District Court granted the Justices' motion dismissing them from the case. Then the remaining defendants filed a motion for summary judgment. The district court granted the motion, dismissed the rest of Plaintiffs' case, and denied Plaintiffs' counter motion for a preliminary injunction against the State's integrated bar rule, 810 F.Supp. 966. After reviewing the district court's grant of summary judgment *de novo, McMillan v. Svetanoff,* 878 F.2d 186, 188 (7th Cir.1989), we

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[3](...continued)
arbitration for the fiscal year, the state bar shall offer such increased pro rata reduction to members first admitted to the state bar during that fiscal year and after the date of the arbitrator's decisions.

vacate and remand in part, affirming the rest of the district court's judgment.

II. Analysis

In their appeal, Plaintiffs argue the following: (A) the federal courts have subject matter jurisdiction over Plaintiffs' claims against (1) the State Bar Association as an entity, and (2) the Justices of the Wisconsin Supreme Court, (B) the doctrine of qualified immunity does not bar Plaintiffs' damage claims against the defendant Smay (the Bar's Executive Director) for his alleged official misconduct, and (C) both Wisconsin's present integrated bar and dues reduction plan fail to pass constitutional muster thus entitling Plaintiffs to injunctive relief. We shall address these arguments serially.

A. Subject Matter Jurisdiction

Plaintiffs arguments focus on the merits of a qualified immunity defense with respect to both Smay and the State Bar. In so doing, Plaintiffs apparently have assumed that the State Bar, as an entity, is entitled to raise the qualified immunity defense. In fact, the question of whether a non-natural person, such as the State Bar, may raise a qualified immunity defense has yet to be settled.[4] Today we need not grapple with this question because the Constitution of the United States may not grant us any judicial power to hear either Plaintiffs' claims against the State Bar or those against the Wisconsin Justices.

1. The State Bar Association

[1-4] In our federalist system of dual sovereignty the jurisdiction of the federal courts is limited to the grants of

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[4]Not only was the non-natural person issue not briefed for us, but Plaintiffs resisted discussing this possible objection even after several pointed queries from this court during oral argument.

power declared in the Constitution. Plaintiffs having brought their suit in a federal court must endeavor to surmount one of the Constitutions' unavoidable jurisdictional hurdles, that of state sovereign immunity. While we note that a state's sovereign immunity sets a constitutional lid on the exercise of federal judicial power, we must also be mindful that when a citizen sues his home state the Constitution's Eleventh Amendment is evidence, but not the origin of this doctrine.[5] *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). In developing the *Hans* doctrine, the Eleventh Amendment has served as a historical framework for the Supreme Court's teaching that the Constitution never granted federal courts any judicial power over suits by a citizen against his own state.[6]

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[5]We mention this fact only because, in explicating the *Hans* doctrine, some courts have used "the Eleventh Amendment" as a short-hand substitute for the *Hans* doctrine's authority and origin. While convenient, this characterization is imprecise. The text of the Eleventh Amendment clearly does not provide for immunity when a citizen sues his resident state. U.S. Const. amend. XI. ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

[6]The States passed the Eleventh Amendment in reaction to the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793), and constitutionally overruled *Chisholm* which had allowed federal subject matter jurisdiction over a suit against a state by a citizen of another state. Nearly a hundred years later, when a resident citizen attempted to sue his own state in federal court, the Court in *Hans* held that federal courts lacked subject matter jurisdiction over such a suit. The Court reasoned as follows:

> "Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from

(continued...)

Without some affirmative constitutional grant the federal courts lack any judicial power to decide a case. *See Hans*, 134 U.S. at 15, 10 S.Ct. at 507; *see also Pennhurst v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 906, 79 L.Ed.2d 67 (1984). Therefore, when a state citizen sues an entity that happens to be an arm of that citizen's home state, then a federal court, under *Hans* and its progeny,[7] ordinarily lacks subject matter jurisdiction.[8] Of course for the *Hans* doctrine to forbid federal jurisdiction, a suit against the state bar association must appropriately be considered a suit against an arm of the state. While the actual state status of "state" bar associations will vary from state to state, the case law confirms that in several instances state bar associations will be protected by sovereign immunity.

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[6](...continued)
being sued by its own citizens in cases arising under the Constitution or laws of the United States; can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

"The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States." *Hans*, 134 U.S. at 15, 10 S.Ct. at 507.

[7]Though criticized, especially by the academy, the *Hans* doctrine has been repeatedly affirmed. *Monaco v. Mississippi*, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1281 (1934); *Employees v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973); *Atascadero v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985); *McKesson v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990).

[8]We say ordinarily because there are exceptions to this bar which concededly make the Eleventh Amendment and *Hans* immunity peculiar jurisdictional rules. For example, Congress can abrogate state sovereign immunity, *see Welch v. Texas Department of Public Transportation*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976); Furthermore, a state can consent to suit in federal court, *see infra* note 11 and accompanying text.

[5] The Supreme Court has never directly addressed the sovereign immunity of state bars,[9] but its approach in related areas may be helpful to the analysis. For example, in holding that the actions of a state bar association constituted enough official state action to exempt a state bar from antitrust law, the Supreme Court has noted that "the regulation of the activities of the bar is at the core of the State's power to protect the public . . .. Few other professions are as close to the core of the State's power to protect the public. Nor is any trade or other profession as essential to the primary governmental function of administering justice." *Hoover v. Ronwin*, 466 U.S. 558, 569 n. 18, 104 S.Ct. 1989, 1996 n. 18, 80 L.Ed.2d 590 (1984) (citations omitted). The Court concluded that because of this close relationship, "although only the State Bar was named as a defendant in the suit, the [plaintiff's] complaint was with the State." *Id.* at 571, 104 S.Ct. at 1977.

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[9]Neither *Keller*, 496 U.S. 1, 110 S.Ct. 2228, the Court's most recent bar-association case, nor *Bates v. State of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 55 L.Ed.2d 810 (1977) (where the court also decided claims against a state bar on the merits imply that a suit against a state bar association is not a suit against the state for the purposes of sovereign immunity. The doctrine of sovereign immunity does not apply when, as in *Keller* or *Bates*, the Supreme Court exercises its appellate jurisdiction over a case arising from state court. *McKesson*, 496 U.S. at 27, 110 S.Ct. at 2245.

Nor can the Supreme Court's review in either *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), or *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984), represent an implicit holding that the jurisdictional bar of sovereign immunity does not apply when a state bar is sued in federal court. In *Goldfarb*, the Court explicitly noted: "The State Bar also contends that it is protected by the Eleventh Amendment. Petitioners dispute this contention, and the District Court had no occasion to reach it in view of its holding. Given the record before us we intimate no view on the issue, leaving it for the District Court on remand." *Id.* 421 U.S. at 792 n. 22, 95 S.Ct. at 2016. (citations omitted). In *Hoover*, the state bar association was already dismissed from the suit by the district court before the case reached the Court. 466 U.S. at 565 n. 12, 104 S.Ct. at 1993 n. 12; *see also Lathrop*, 367 U.S. 820, 81 S.Ct. 1826.

With respect to state bar associations and sovereign immunity the lower federal courts that have addressed this issue unanimously have found particular state bars entitled to the sovereign immunity defense. *See Lewis v. Louisiana State Bar Ass'n*, 792 F.2d 493 (5th Cir.1986) (holding that federal courts lacked jurisdiction to hear a suit by a Louisianian against the Louisiana State Bar); *Bishop v. State Bar of Texas*, 791 F.2d 435 (5th Cir.1986) (holding the Texas State Bar could not be sued by a Texan); *Lupert v. California State Bar*, 761 F.2d 1325 (9th Cir.1986), *cert. denied*, 474 U.S. 916, 106 S.Ct. 241, 88 L.Ed.2d 251 (1986) (holding that the federal courts lacked jurisdiction to hear a suit by a Californian against the California State Bar); *Ginter v. State Bar of Nevada*, 625 F.2d 829, 830 (9th Cir.1980) (holding the Nevada State Bar was immune from suit by a Nevadan); *Doyle v. Oklahoma Bar Ass'n*, 787 F.Supp. 189 (W.D. Okl. 1992) (holding that the Oklahoma state bar association was an instrumentality of the state, and thus, federal courts lacked jurisdiction to hear a suit for damages by an Oklahoman).

[6] We agree that a suit against a state bar association, as a general matter, may constitute a suit against the state for sovereign immunity purposes. Whether the Wisconsin State Bar, in particular, is vested with sufficient state characteristics to qualify for sovereign immunity is a factual question; however, that cannot be answered now on the record before us.[10] We

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[10]The parties never addressed the issue of sovereign immunity, but because it is jurisdictional, we raise it *sua sponte*. *See Pennhurst*, 465 U.S. at 99 n. 8, 104 S.Ct. at 907 ("The limitation deprives federal courts of any jurisdiction to entertain such claims, and thus may be raised at any point in a proceeding."); *Edelman v. Jordan*, 413 U.S. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974) (holding that a state's sovereign immunity "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."); *Shabazz v. Coughlin*, 852 F.2d 697, 699-700 (2d Cir.1988); *see also* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3524 at 170 n. 83 (2d ed. 1984), discussing *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1981).

therefore vacate that part of the district court's decision holding for the State Bar of Wisconsin, and remand this case for a determination of the State Bar's sovereign status.

[7, 8] After additional briefing along with any other discovery deemed appropriate, the district court must ultimately determine whether the suit against the Wisconsin State Bar Association is properly considered a suit against the state *qua* state. In making its finding the district court should consider the extent of control exercised over the Bar by the Wisconsin Supreme Court (or the State at large). *See Lewis,* 792 F.2d at 497 discussing *Bates,* 433 U.S. at 361, 97 S.Ct. at 2697, and *Hoover,* 466 U.S. at 569 n. 18, 571, 104 S.Ct. at 1995 n. 18, 1996. In this matter we agree with *Lewis,* that the analysis presented in both *Bates* and *Hoover* is applicable to questions of sovereign immunity. If the Wisconsin Supreme Court had the ultimate authority to adopt and enforce the Bar's rules in question, then a suit against the Bar challenging those rules may be not that different from a suit directly against the Wisconsin Supreme Court. *See Lewis,* 792 F.2d at 497. The district court should also consider, as additional indication of state control, whether the Wisconsin State Bar has a role completely defined by the Wisconsin Supreme Court—that is whether the Bar was acting as the agent of the Court when it promulgated the rules in question. *Id.* Also relevant is whether a judgment against the State Bar would ultimately be paid by the state's treasury. *See Paschal v. Jackson,* 936 F.2d 940 (7th Cir.1991); *Cannon v. University of Health Sciences,* 710 F.2d 351, 356 (7th Cir.1983); *see also Lewis,* 792 F.2d at 498 (holding that since the dues of the Louisiana Bar Association, an integrated bar, are *actually* state license taxes levied by the express authority of the state legislature, they are thus unavailable as damages under the doctrine of sovereign immunity). We hasten to note, however, that even when there is no risk to the state treasury, the state is immune when sued in its own name. *See Zych v. Wrecked Vessel Believed to be the Lady Elgin,* 960 F.2d 665, 669 (7th Cir.1992) (rejecting the

notion that an absence of financial impact on the state is a *per se* pass from the Eleventh Amendment's purview); *see also Green v. Mansour*, 474 U.S. 64, 72, 106 S.Ct. 423, 427, 88 L.Ed.2d 371 (1985). Thus, even without any impact on the state's treasury, the district court must consider whether the Bar occupies the position of a public agency or official, necessarily forbidding any suit in federal court. *See Lewis*, 792 F.2d at 497 (discussing *Bates*, 433 U.S. at 361, 97 S.Ct. at 2697); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2311, 105 L.Ed.2d 45 (1989) (Sovereign immunity forbids a suit against an individual or entity who occupies the position of a state office—even if there is no fiscal impact on state funds—just as if the state had been named directly as a party to the suit.).

If after its analysis the district court finds that a suit against the Wisconsin State Bar is a suit against the State, then unless one of the recognized exceptions to a state's sovereign immunity applies here,[11] it must dismiss all of Plaintiffs' claims against the Wisconsin State Bar for lack of subject matter jurisdiction.

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[11]For example, while we recognize that a general appearance by an authorized representative of the state may constitute an implied consent to suit under some circumstances, thus waiving the sovereign immunity defense, *see, e.g., Hankins v. Finnel*, 964 F.2d 853 (8th Cir.1992), *cert. denied*, __ U.S. __, 113 S.Ct. 635, 121 L.Ed.2d 566 (1992), the Wisconsin State Bar may not have had the authority to effectuate such an important waiver unilaterally. *See Employees*, 411 U.S. at 285, 93 S.Ct. at 1618. The Wisconsin Constitution, art. IV § 27 provides ["t]he legislature shall direct by law in what manner and in what court suits may be brought against the state." In interpreting this language, the Wisconsin Supreme Court has held that "a state agency or officer may not waive the state's sovereign immunity without specific authorization nor will principles of estoppel be applied so as to deprive a state of its sovereign rights." *Lister v. Board of Regents*, 72 Wis. 2d 282, 240 N.W.2d 610 (1976). In some circumstances even "the attorney general may appear on behalf of the state . . . without waiving the state's sovereign immunity to suit." Wis.Stat. § 895.46(1)(a) (1983). Whether under the circumstance of this case the state bar waived any sovereign immunity it may have had is an issue possibly worthy of exploration on remand.

2. The State Court Justices

[9, 10] Plaintiffs' claims against the Justices of the Wisconsin Supreme Court must be dismissed for jurisdictional reasons. Plaintiffs concede that any prayer for retrospective relief against the Justices "in their official capacity" would lack subject matter jurisdiction.[12] However, the limited jurisdiction of the federal courts not only bars any possible retrospective claims against the Justices, but also mandates that we dismiss Plaintiffs' prayer for injunctive relief because it fails to present an Article III case or controversy.

[11, 12] Article III of the Constitution extends the judicial power of the United States only to real cases or controversies. U.S. Const. art. III, § 1. As a result federal courts lack the power to give advisory opinions in hypothetical cases. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806). Plaintiffs argue that because the Justices might someday enforce the Bar's rules, Plaintiffs have a ripe claim. We disagree. Before a plaintiff may obtain an injunction against a future enforcement he must show some substantial hardship—the enforcement must be certain and the only impediment to the case's ripeness is a delay before its eventual prosecution. *Steffel v. Thompson*, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 89 L.Ed.2d 505 (1974) (allowing an injunction against police when the plaintiff or his friends had twice before been arrested for distributing the same handbills at the same shopping center.) When pressed by the panel during oral argument Plaintiffs' counsel conceded that he was unaware of any Wisconsin lawyer ever being disciplined by the Justices for that lawyer's failure to pay dues to the integrated bar. In the absence of any real threat of harm resulting from

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[12]Brief for Appellant at 42, *Crosetto v. State Bar*, No. 92-3899 (7th Cir.1993). *See also supra* pp. 1400-02. Only prospective relief can be sought against the Justices sued in their official capacity. *See Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

noncompliance with the dues requirement, Plaintiffs' immediate claim is not ripe against the Justices, and must be dismissed for lack of subject matter jurisdiction. Therefore, we affirm the district court's decision to dismiss Plaintiffs' case against the Justices.

B. Qualified Immunity

Federal courts have subject matter jurisdiction over Plaintiffs' claims against Mr. Smay, the Executive Director of the Wisconsin State Bar, sued in his individual capacity for allegedly violating Plaintiffs' First and Fourteenth Amendment rights. 28 U.S.C. § 1331. However, as an individual serving in a state office, Smay may be entitled to qualified immunity. *Abel v. Miller,* 824 F.2d 1522, 1580 (7th Cir.1987).

[13-15] The doctrine of qualified immunity "is intended to provide governmental officials with the ability 'to anticipate reasonably when their conduct may give rise to liability for damages.'" *Id.* at 1533 (quoting *Anderson v. Creighton,* 483 U.S. 635, 646, 107 S.Ct. 3034, 3042, 97 L.Ed.2d 523 (1989)). In *Harlow v. Fitzgerald,* the Supreme Court explained that defendants are shielded from liability by the doctrine of qualified immunity "insofar as their conduct doe not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *see also Williams v. Anderson,* 959 F.2d 1411, 1414 (7th Cir.1992). Where the affirmative defense of qualified immunity is properly raised, "the plaintiff bears the burden of establishing the existence of the allegedly clearly established constitutional right." *Rakovich v. Wade,* 850 F.2d 1180, 1209 (7th Cir.1988), *cert. denied,* 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 534 (1988) (citations omitted). For the qualified immunity defense to fail, "what is required is a 'sufficient consensus,' based on all relevant case law, indicating that the official's conduct was unlawful." *Landstrom v. Illinois Dep't of Children,* 892 F.2d 670 676 (7th

Cir.1990). Since Smay properly raised this defense, unless Plaintiffs can show that a sufficient consensus clearly established the existence of a violated constitutional right, Smay will receive qualified immunity from Plaintiffs' damage claims.

[16] Plaintiffs have not begun to meet their burden. The constitutional rights allegedly breached by Smay were not clearly established to a sufficient legal consensus at the time of the alleged violation. Far from being clearly established in 1990, *Keller,* 496 U.S. at 1, 110 S.Ct. at 2228 (which extended the rules of *Hudson,* 476 U.S. 292, 106 S.Ct. 1066,[13] to bar associations), represented the first definitive legal statement that mandatory bar dues had the same restrictions on their use as compulsory union dues. *See Schneider v. Colegio,* 917 F.2d 620, 624 (1st Cir.1990), *cert. denied,* __ U.S. __, 112 S.Ct. 865, 116 L.Ed.2d 772 (1992); *see also, supra* notes 9, 12-14 and accompanying text discussing *Keller* and integrated bar dues. As the district court found, before the *Keller* decision "even the basic issue of the applicability of First Amendment protections to lawyers in an integrated bar was open to question." *Crosetto v. State Bar,* No. 88 C 433 C, Mag. Report and Recommendation at 33 (Magis.Ct., N.D.Ill., W.Div., 1992) (hereinafter, "*Magistrate's Report*"). Notably, the California Supreme Court was reversed by the Supreme Court of the United States on this point of law as late as 1990. *See generally, Keller,* 496 U.S. at 1, 110 S.Ct. at 2228. The doctrine of qualified immunity is designed to relieve public officials from having to predict, at their own financial peril, how judges might decide future close cases. As this circuit has stated, "government employees must obey the law in force at the time but need not predict its evolution". *Greenberg v. Kmetko,* 922 F.2d 382, 385 (7th Cir.1991). Because the law confronting Smay before 1990 did not clearly establish to a sufficient legal consensus that his

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[13] *Hudson* prohibited, as a violation of the First Amendment, a labor union from using union dues for political contributions against union member's will.

activities would subject him to any liability, Smay is entitled to qualified immunity for his conduct during this period. We affirm the district court's dismissal of Plaintiffs' damage claims against Smay.

C. Integrated Bar Dues

[17] All that remains of Plaintiffs' case is their prayer for an injunction "to prevent the reintegration of the Wisconsin State Bar under the revised Wisconsin Supreme Court rules and State Bar by-laws governing legislative activities.". *Magistrate's Report* at 40. After considering the merits of Plaintiffs' argument, the district court concluded that the Wisconsin rules and by-laws[14] readily met the requirements established by the Supreme Court in *Keller* and therefore denied Plaintiffs' motion. We agree.

Plaintiffs assert that the compulsory dues plan set out in the State Bar's bylaws and the Wisconsin Supreme Court's rules is facially invalid for failing to comply with *Keller* (which expanded *Hudson* to the arena of state bar associations).[15] However, as noted by the district court, the requirements of *Keller* and *Hudson* were the foundation on which the Wisconsin rules were promulgated. *See Magistrate's Report* at 40. The language of Wisconsin's SCR 10.03(5)(b) follows the language of *Keller* in

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[14] *See supra* note 3 and accompanying text discussing SCR 10.03(b) and State Bar Bylaws.

[15] *See supra* note 9 discussing *Keller*. The *Keller* decision singularly rejected the notion that the "[s]tate [b]ar, considered as a government agency, may use dues for any purpose within the scope of its statutory authority," 496 U.S. at 7, S.Ct. at 2232, and did not represent any type of implicit recognition that the Eleventh Amendment (or the *Hans* doctrine) is inapplicable to suits against state bar associations when the Court reversed a case arising from the California Supreme Court. *Keller*, 496 U.S. at 17, 110 S.Ct. at 2237; *see also generally Bates*, 433 U.S. 350, 97 S.Ct. 2691.

defining what activities may be funded with compulsory dues.[16] Finally, as the district court found, the new Wisconsin rules and by-laws seem to incorporate all the *Hudson* procedural requirements.[17] In *Hudson*, the Supreme Court held that in order to protect the rights of dissenting union employees, a union collecting a fair-share or agency fee must provide procedural safeguards to prevent "compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities." 475 U.S. at 302, 106 S.Ct. at 1074. The Court went on to state that such procedures must include "an adequate explanation of the basis of the fee, a reasonable prompt opportunity to challenge the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 106 S.Ct. at 1077. As the district court found in *Crosetto*, each of these requirements is included in the in the new Wisconsin procedure. *Magistrate's Report* at 37-44.

The Wisconsin rules follow the law of *Keller* and *Hudson* in the following ways: (1) SCR 10.03(5)(b)(2) requires that the Bar provide written notice to all members before the beginning of each fiscal year, describing those activities the Bar has determined are chargeable and those which are non-chargeable, informing members as to the cost of those activities and describing how those amounts were calculated; (2) SCR

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[16]In *Keller* the Supreme Court opined that "the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the State", which compares closely to the language from SCR 10.03(5)(b), "[t]he state bar may use compulsory dues only for activities reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the state bar."

[17]*See supra* note 3 and accompanying text.

10.03(5)(b)(3)-(5) sets up a procedure whereby those who contend that the calculation is incorrect may challenge the calculation and have their challenge promptly determined by an impartial arbitrator; (3) State Bar Bylaws Article 1, Section 5(b) provides that a member demanding arbitration need not pay any dues until October 31 or 15 days following the arbitrator's decision, whichever is later. Therefore because Plaintiffs have failed to identify any defect in the Wisconsin Bar's compulsory dues plan, we hold this plan constitutional both facially and as applied, and thus affirm the district court's denial of Plaintiffs' motion for injunctive relief.

III. Conclusion

For the foregoing reasons we affirm that part of the district court's judgment to dispose of Plaintiffs' suit against the Justices of the Supreme Court and defendant Smay, vacating in part and remanding this case back to the district court for a factual determination of the status of Plaintiffs' suit with respect to the state.

AFFIRMED in part, VACATED in part, and REMANDED.

APPENDIX E

United States Constitution

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV provides in pertinent part:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes

42 U.S.C. § 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ***, subjects, or

causes to be subjected, any citizen of hte United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX F

Wisconsin Supreme Court Rule 10.03(5)(b) (1992)

1. The state bar may use compulsory dues only for activities reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the state bar. Other activities must be supported by voluntary dues, user fees or other sources of revenue.

2. Prior to the beginning of each fiscal year, the state bar shall publish written notice of the activities that can be supported by compulsory dues and the activities that cannot be supported by compulsory dues. The notice shall indicate the cost of each activity, including all appropriate indirect expense, and the amount of dues to be devoted to each activity. The notice shall set forth each member's pro rata portion, according to the class of membership, of the dues to be devoted to activities that cannot be supported by compulsory dues. The notice shall be sent to every member of the state bar along with the annual dues statement. A member of the state bar may withhold the pro rata portion of dues budgeted for activities that cannot be supported by compulsory dues.

3. A member of the state bar who contends that the state bar incorrectly set the amount of dues that can be withheld may deliver to the state bar a written demand for arbitration. Any such demand shall be delivered within 30 days of receipt of the member's dues statement.

4. If one or more timely demands for arbitration are delivered, the state bar shall promptly submit the matter to arbitration before an impartial arbitrator. All such demands for arbitration shall be consolidated for hearing. The costs of the arbitration shall be paid by the state bar.

5. In the event the decision of the arbitrator results in an increased pro rata reduction of dues for members who have delivered timely demands for arbitration for a fiscal year, the state bar shall offer such increased pro rata reduction to members first admitted to the state bar during that fiscal year and after the date of the arbitrator's decision.

APPENDIX G

State Bar Bylaw Article I, Section 5 (1992)

(a) Demands for arbitration of the dues reduction under SCR 10.03(5)(b) shall be made in writing and shall be delivered to the Executive Director of the State Bar within 30 days of receipt of the member's dues statement. Delivery may be made in person or by first class mail, and mailed demands will be deemed delivered upon mailing. Demands shall include the name and address of the member or members demanding arbitration, a brief statement of the claim or objection, and the signature of the member or members.

(b) If one or more timely demands for arbitration are delivered, the State Bar shall agree to submit the matter forthwith to arbitration. All timely demands for arbitration shall be consolidated for hearing before the arbitrator appointed, and the provisions of sec. 788, Stats., shall apply as if the parties had entered into a written agreement for arbitration. A member demanding arbitration is required to pay his or her dues by October 31 or 15 days following the arbitrator's decision, whichever is later. Failure to pay dues by such date shall automatically suspend the delinquent member.

(c) Upon receipt of all demands for arbitration, the State Bar shall apply for appointment of an impartial arbitrator to the Chief Judge of the Federal District Court for the Western District of Wisconsin.

(d) Members demanding arbitration shall have access to the financial records upon which the State Bar based the determination of the amount of dues that can be withheld. These records shall be available for inspection and copying during normal business hours. Copying shall be at the member's expense.

(e) The arbitrator shall determine the date, time and location of the arbitration hearing(s) and shall so notify the parties at least 15 days prior to said hearing(s). The arbitrator will promptly hold hearings in which the parties will be permitted to participate personally or through a representative. The State Bar shall bear the burden of proof regarding the accuracy of the determination of the amount of dues that can be withheld. All parties will be given the opportunity to present evidence and to present arguments in support of their positions. The following rules shall apply to the arbitration proceedings:

i. There will be no transcripts or post-hearing briefs.

ii. The arbitrator will issue an award stating the reasons for the decision within five business days of the closing of the hearing. The opinion will be brief, and based on the evidence and arguments presented.

iii. The arbitrators will charge a maximum of $100 per hour for services, including the hearing, preparation and study time, and shall be reimbursed for all necessary expenses of the arbitration.

iv. The hearing shall be held within 30 days of the appointment of the arbitrator.

v. The arbitrator shall not be deemed a necessary party in judicial proceedings relating to the arbitration.

vi. The arbitrator shall have no authority to add, subtract, set aside or delete from any Supreme Court Rule, or State Bar Bylaw.

(f) Members first admitted to the State Bar after the date of notification to members shall be given that notification with their initial dues statements. Such members shall be further notified that they may deliver a demand for arbitration within

30 days following receipt of the notification. If arbitration is pending at the date of delivery of a demand for arbitration by a newly admitted member, the newly admitted member's demand shall be consolidated with the pending arbitration. All of the provisions of this section shall otherwise apply to demands for arbitration filed by newly admitted members.

(2)

Supreme Court, U.S.
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No. 96-975

In The

Supreme Court of the United States

October Term, 1996

JOHN CROSETTO,

Petitioner,

v.

STATE BAR OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals properly determined that the State Bar of Wisconsin is immune from suit in the federal courts under the Eleventh Amendment to the United States Constitution.

2. Whether the district court properly exercised its discretion in denying leave to amend a complaint adding new parties and new claims, where the only issue remaining on remand was jurisdictional, discovery had been completed, and the proposed claims were already the subject of a pending parallel case.[1]

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[1] The State Bar has not presented a counterstatement to petitioner's third question presented. That question relates to petitioner's claims concerning the constitutionality of the arbitration provisions of the State Bar's dues reduction rule. Those claims were already decided adversely to petitioner on his first appeal in this matter. *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1404-05 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2138 (1994). While petitioner sought to amend his complaint to challenge the present dues reduction rule, adopted while the first appeal was pending, the relevant portions of the arbitration provisions are identical to those considered in the first appeal. *See* 12 F.3d at 1399 n.3; SCR 10.03(5)(b) (Supp. App. 7a-8a). Thus, the Court has already denied a petition for *certiorari* on petitioner's third question presented. *See infra* pp. 1-3 (detailing procedural history of this case). To the extent petitioner sought to raise new challenges to the present rule in his amended complaint, his motion to amend was properly denied. *See infra* pp. 13-14.

LIST OF PARTIES AND RULE 29.1 LIST

In addition to the names of parties which appear in the caption of this case, Douglas Kammer and Kenneth Doran were parties to the proceeding in the Court of Appeals. By order dated March 15, 1996, Mr. Doran was voluntarily dismissed as a party to the appeal. Mr. Kammer has not joined in the petition here. None of the parties below or before this Court is a corporation.

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RESPONDENT STATE BAR OF WISCONSIN'S BRIEF IN OPPOSITION

The respondent State Bar of Wisconsin ("State Bar" or "Bar"), by its undersigned counsel, respectfully requests that this Court deny the petition for writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit for review of the judgment in this case.

COUNTERSTATEMENT OF THE CASE

Petitioner's description of the "Nature of the Case" is materially incomplete and factually inaccurate and, more importantly, largely irrelevant to the issues before this Court.

A. Course of Proceedings Below.

This case is yet another chapter in the "long history of litigation surrounding Wisconsin's mandatory bar rule." *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1397 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2138 (1994). It was originally brought against the State Bar of Wisconsin, its executive director Stephen L. Smay, and the Justices of the Wisconsin Supreme Court in May 1988, shortly after the decision in *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478 (W.D. Wis. 1988). (Complaint, R. 2) Although subsequently reversed, *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 493 U.S. 873 (1989), the district court decision ruled that the integrated bar in Wisconsin violated the First Amendment to the United States Constitution.

Petitioner purported to bring this suit as a class action on behalf of all members of the State Bar who allegedly were required to support the State Bar's past expenditures in violation of the First and Fourteenth Amendments. He sought approximately $500,000 in compensatory damages (allegedly representing the amount of mandatory dues spent on unconstitutional activities during fiscal years 1983 through 1987) and some $600,000 in punitive damages for defendants' alleged reckless disregard of the petitioner's constitutional rights. (Complaint, R. 2) In addition, the complaint sought to enjoin the State Bar from returning to mandatory status. (*Id.*)

Following this Court's decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990), the claims against the Justices of the Wisconsin Supreme Court, the State Bar and Smay were dismissed in their entirety. *Crosetto v. Heffernan*, 771 F. Supp. 224 (W.D. Wis. 1990); *Crosetto v. Heffernan*, 810 F. Supp. 966 (W.D. Wis. 1992)

The Court of Appeals affirmed the dismissal of the claims against the justices and Smay, but questioned *sua sponte* whether the subject matter jurisdiction of the federal courts extended to claims against the State Bar of Wisconsin. Noting that state bars had been consistently found immune from suit under the Eleventh Amendment, the Court of Appeals remanded to the district court for a determination of the State Bar's sovereign status. *Crosetto v. State Bar of Wisconsin*, 12 F.3d at 1402. This Court denied the subsequent petition for a writ of certiorari. ___ U.S. ___, 114 S. Ct. 2138 (1994).

Despite the Court of Appeals' narrow mandate, petitioner sought leave to amend the complaint to add a new

challenge to the current dues reduction rule (amended slightly while this matter was before the Court of Appeals the first time) and to add the Bar's then-current Board of Governors as defendants in order to avoid jurisdictional issues on that claim. (R. 458) At the same time, a virtually identical challenge to the State Bar's current dues reduction rule was filed by other plaintiffs in the Western District of Wisconsin, seeking declaratory and injunctive relief. *Thiel, et al. v. State Bar of Wisconsin, et al.* That case, like petitioner's proposed amended complaint, sought injunctive relief against the individual members of the Bar's Board of Governors.

The district court denied petitioner's motion to amend on two grounds. First, the district court recognized that allowing petitioner to amend would prejudice the State Bar and unduly burden the court by substantially expanding and prolonging this litigation. Second, petitioner would not be prejudiced because the claims he sought to assert were duplicative of those already pending in *Thiel* and the relief sought in that case would benefit petitioner if granted. (App. 17a-21a)[2]

On September 5, 1995, the district court issued its decision in *Thiel*. It held that the State Bar was immune from suit in the federal courts under the Eleventh Amendment and that the Bar's current dues reduction rule did not violate the First Amendment. (R. 512, Tab 1)

On December 15, 1995, the district court issued its opinion and order in this case. It, too, held that under the Eleventh Amendment, federal courts lack subject matter

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[2] Citations to "App." refer to Petitioner's Appendix.

jurisdiction over petitioner's claims against the Bar and ordered that the case be dismissed. (App. 3a-16a)

The Court of Appeals issued its decision in *Thiel* on September 3, 1996, affirming the district court's opinion. *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 400 (7th Cir. 1996). No petition for a writ of certiorari was filed in that case. On September 17, in an unreported order, relying on its decision in *Thiel*, the Court of Appeals also affirmed the trial court's opinion in this case. (App. 1a-2a)

B. Statement of Relevant Facts

The State Bar of Wisconsin is an association of all persons licensed to practice law in the State of Wisconsin. Wisconsin Supreme Court Rule (SCR) 10.01(1); 10.02(1); 10.03(1).[3] Membership in the Bar is a condition precedent to the right to practice law in Wisconsin. SCR 10.01(1); 10.03(2).

1. The Wisconsin Supreme Court has ultimate, direct and exclusive control over the State Bar and the Bar is the Court's agent in enforcing the rules challenged here.

The State Bar of Wisconsin was created by the Wisconsin Supreme Court "in the exercise of the court's inherent authority over members of the legal profession," SCR 10.02(1), to aid the Court in fulfilling its constitutional authority over the administration of justice. Wis.

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[3] The text of the Wisconsin Supreme Court Rules governing the State Bar of Wisconsin cited here are set out in the Supplemental Appendix attached to this brief.

Const. art. VII; *Lathrop v. Donohue*, 10 Wis. 2d 230, 243, 102 N.W.2d 404, 411 (1960), *aff'd*, 367 U.S. 820 (1961). In creating the Bar, the Wisconsin Supreme Court has "by appropriate orders . . . provide[d] for the organization and government of the association." SCR 10.01(2). Thus, the Bar does not follow the legislative procedures set out in the Wisconsin Statutes applicable to many other state agencies.

In addition to the crucial decision to integrate the Bar – the decision which is really at the heart of this case – and the broad authority contained in SCR 10.01(2) to define the rights, obligations and conditions of membership, the Supreme Court manifests its ultimate authority over the State Bar in a variety of ways. For example:

> (1) the Bar is required to include in each year's membership dues the amount necessary to pay the costs of the Board of Attorneys Professional Responsibility and the continuing legal education functions of the Board of Bar Examiners (SCR 10.03(5)(a));
>
> (2) the Court also retains ultimate control over Bar dues and the Bar's budget by (a) retaining ultimate authority over any increase in Bar dues (SCR 10.03(5); *In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv, xliv (1977)); (b) limiting the activities in which the Bar may be engaged, specifically limiting the use of dues for ideological and political activities and providing a remedy for Bar members who believe the Bar has overstepped its authority (SCR 10.03(5)(b)); (c) prohibiting the Bar from making contributions to candidates for public office (*Report of Committee to Review the State Bar*, 112 Wis. 2d xix, 334 N.W.2d 544 (1983)); (d) requiring Bar sections to

charge annual dues (SCR 10.05(4)(e)(4)); (e) requiring the Board of Governors to procure an annual audit of the Bar's books (SCR 10.09(1)) and requiring a copy of the annual audit report to be filed with the Supreme Court (SCR 10.09(2)); and (f) requiring the Bar to give notice before suspending a member for nonpayment of dues (*Disciplinary Proceedings Against Cyrak*, 124 Wis. 2d 493, 498, 369 N.W.2d 708, 711 (1985));

(3) the Court's rules set the deadlines within which members must enroll and pay dues and establish the penalty for nonpayment of Bar dues (SCR 10.03(2), 10.03(6));

(4) the Court's rules establish the manner in which the Bar may conduct its daily business, establish the Bar's governing bodies and offices and define their respective powers, functions and duties (SCR 10.04-.09, 10.11); and

(5) the Court retains ultimate authority to review amendments of the Bar's bylaws (SCR 10.05(4)(a)(8)).

The Wisconsin Supreme Court also has the exclusive, inherent power to take remedial action against the Bar upon sufficient showing that the activities or policies of the Bar are not in harmony with the objectives of integration or are otherwise contrary to the public interest. *In re Integration of the Bar*, 5 Wis. 2d 618, 93 N.W.2d 601 (1958).

In the exercise of its authority over the Bar, the Wisconsin Supreme Court has provided the State Bar with a fair degree of autonomy in the conduct of its daily affairs. For example, it may, "for the purpose of carrying out the purposes for which it is organized, sue and be sued, enter into contracts, acquire, hold, encumber and

dispose of real and personal property." SCR 10.02(1). Its funds are deposited in accounts held in the name of the State Bar of Wisconsin. (R. 127, ¶ 37) It handles its own personnel matters, setting its own wage rates and classifications, providing its own pension, health insurance and other benefits plans, and paying its employees on checks drawn on State Bar accounts. (*Id.*, ¶ 38; R. 141, ¶ 38)[4]

Despite this day-to-day autonomy, the Supreme Court has explicitly recognized and exercised its authority over the Bar numerous times. Since 1943, the structure, purposes and activities of the Bar have undergone repeated review by the Court and by committees appointed by the Court for that purpose. *See, e.g., Integration of the Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943) (declining to integrate the Bar); *In re Integration of the Bar*, 249 Wis. 523, 25 N.W.2d 500 (1946) (same); *In the Matter of the Integration of the Bar*, 273 Wis. 281, 77 N.W.2d 602 (1956) (integrating the Bar on an interim basis and adopting Supreme Court Rules governing the Bar); *In re Integration of the Bar*, 5 Wis. 2d 618, 93 N.W.2d 601 (1958) (making its

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[4] The State Bar's general autonomy in day-to-day activities noted by petitioner has never been disputed by the State Bar. However, the State Bar does dispute the statement made (several times) in petitioner's brief that while the State Bar does not follow certain statutes regarding state employees or other fiscal matters "it has never been told by the Wisconsin Supreme Court that it is free to disregard them." *See, e.g.*, Petitioner's Brief at 8. That statement is false. Wisconsin Supreme Court rules establishing and governing the Bar explicitly deal with the Bar's rights and obligations with respect to those matters. *See, e.g.*, SCR 10.05(4) (defining the duties and responsibilities of the Bar's Board of Governors).

integration order permanent); *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961) (rejecting challenge to the Bar on First Amendment grounds); *Axel v. State Bar of Wisconsin*, 21 Wis. 2d 661, 124 N.W.2d 671 (1963) (denying injunction to prevent Bar from publishing the results of a judicial qualification poll); *In re Amendment of State Bar Rules*, 37 Wis. 2d 465, 155 N.W.2d 820 (1968) (amending rule concerning dues of judicial members); *In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv (1977) (among other things, continuing integration order, creating rule providing for regular review of Bar activities, authorizing section legislative activities, approving dues increase and prohibiting Bar support for political candidates); *State ex rel. Armstrong v. Board of Governors*, 86 Wis. 2d 746, 273 N.W.2d 356 (1979) (rejecting petition to submit issue of integration and use of dues to membership of Bar); *In re Discontinuation of the State Bar of Wisconsin as an Integrated Bar*, 93 Wis. 2d 385, 286 N.W.2d 601 (1980) (denying petition to disintegrate Bar and appointing committee to review activities of the Bar); *Report of Committee to Review the State Bar*, 112 Wis. 2d xix, 334 N.W.2d 544 (1983) (among other things, continuing integration of the Bar, accepting recommendation of a procedure allowing dues reduction for legislative activities, and prohibiting Bar involvement in LAWPAC); *In re Amendment of State Bar Rules: SCR 10.03(5)*, slip op. (Wis. Sup. Ct. Jan. 21, 1986) (establishing a dues reduction for legislative activities) (R. 69, Tab 67); *In re Petition to Review State Bar Bylaw Amendments*, 139 Wis. 2d 686, 407 N.W.2d 923 (1987) (rejecting constitutional challenge to legislative activities dues reduction and arbitration bylaw); *In re Supreme Court Rules Chapter 10: Regulation of*

the Bar, slip op. (Wis. Sup. Ct. May 26, 1988) (disintegration order) (R. 269, ¶ 3, Exhibit A); *In re State Bar of Wisconsin: Membership*, 169 Wis. 2d 21, 485 N.W.2d 225 (1992) (reintegrating the State Bar); *In re Amendment of Supreme Court Rules, SCR 10.03(5)(b) – State Bar Membership Dues Reduction*, 174 Wis. 2d xiii (1993) (amending the rule relating to the use of dues for political and ideological activities).

2. State Bar funds are state funds.

Property owned by the State Bar of Wisconsin is exempt from real and personal property taxation under Wis. Stat. § 70.11(1) because it is property owned by the state. 48 Op. Att'y Gen. 30 (Wis. 1959) (R. 439, Tab 3). State Bar funds are state funds (although, pursuant to SCR 10.04(2)(e), 10.09, and 10.11(2), they need not be deposited in the same accounts as other state funds). *Id.* at 34-35. The Bar does not pay Wisconsin sales or income tax. (R. 273, Tab 5, ¶ 19). It is not subject to federal income tax and is not required to file income tax returns. 48 Op. Att'y Gen. at 38.

3. The State Bar is a state agency under Wisconsin law.

The Bar, its Board of Governors, employees and agents have been and will in the future be represented by the Attorney General of the State of Wisconsin for acts within the authority granted by the Wisconsin Supreme Court. 75 Op. Att'y Gen. 153 (Wis. 1986). (R. 439, Tab 4) Volunteer lawyers performing services in connection with

the State Bar's Lawyer Referral and Information Service are public officers entitled to indemnification as agents of the state. *Id.* The State Bar is authorized as an "agency of Wisconsin state government" to use the legislative drafting services of the Legislative Reference Bureau. Joint Rules of the Wisconsin Legislature No. 51(2) (R. 436). The Wisconsin Blue Book, which is required by the legislature to include information "pertaining to the organization of Wisconsin state government," Wis. Stat. § 35.24, lists the State Bar as an "Associated Unit" of the Judicial Branch of the State of Wisconsin. Wisconsin Blue Book, pp. 607-08 (R. 439, Tab 5).

C. Response to Petitioner's "Factual Background."

Petitioner devotes a substantial portion of his brief addressing the State Bar's alleged LAWPAC activities and timekeeping practices, all of which occurred in the early 1980s. Only two responses are necessary.

First, petitioner's complaints were expressly considered, and rejected, by the district court in its first opinion dismissing petitioner's claims. *See Crosetto v. Heffernan*, 810 F. Supp. at 979 (no "real evidence" to support petitioner's complaints concerning LAWPAC; "Plaintiffs' allegations [concerning timekeeping practices] are not supported by the record"). Since the Court of Appeals affirmed the district court's opinion and this Court refused further review, that decision is law of the case.

Second, none of those "facts" are material. Even if petitioner's allegations were true, they have nothing to

do with whether the Eleventh Amendment bars petitioner's claims against the State Bar or whether his motion to amend was properly denied.[5]

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN THE CASE LAW.

A. There Is No Conflict In The Tests Used By The Courts Of Appeals To Determine Whether An Entity Is An Arm Of The State Under the Eleventh Amendment.

Petitioner argues that this Court should review the decision below because there is a conflict in the case law between the decision below and the decisions of the other Courts of Appeals. United States Supreme Court Rule 10. In essence, petitioner claims that unlike the decision of the Court of Appeals below, the majority of circuits have held that the Eleventh Amendment bars suit only where a judgment will be satisfied from state funds.

Although circuit courts have articulated the analysis in slightly different ways, they have consistently held that the impact of a judgment on the state treasury is not

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[5] This same response applies to petitioner's discussion of the State Bar's 1988 dispute with the United States Postal Service concerning its classification for bulk mailing privileges under the Service's rules. Whether the State Bar is (or was in 1988) a "governmental entity" for purposes of bulk mailing privileges under Postal Service regulations is an entirely different issue than whether it is immune from suit under the Eleventh Amendment.

the only factor to consider in determining whether a defendant is entitled to immunity under the Eleventh Amendment and that immunity may attach even in the absence of any fiscal impact if other factors are present. *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority*, 991 F.2d 935, 939-40 (1st Cir. 1993); *Mancuso v. New York State Thruway Authority*, 86 F.3d 289, 293 (2d Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 481 (1996); *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140, 1144 (3d Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 340 (1995); *Gray v. Laws*, 51 F.3d 426, 434 (4th Cir. 1995); *McDonald v. Board of Mississippi Levee Comm'rs*, 832 F.2d 901, 906-08 (5th Cir. 1987); *Hutsell v. Sayre*, 5 F.3d 996, 999-1002 (6th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994); *Thiel*, 94 F.3d at 401; *Hadley v. North Arkansas Community Technical College*, 76 F.3d 1437, 1440-42 (8th Cir. 1996); *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995); *Haldeman v. Wyoming Farm Loan Board*, 32 F.3d 469, 473 (10th Cir. 1994).

The only exception to this unanimity is the Eleventh Circuit's decision in *Jackson v. Georgia Dept. of Transp.*, 16 F.3d 1573 (11th Cir.), *cert. denied sub nom. King v. Jackson*, ___ U.S. ___, 115 S. Ct. 320 (1994), which stated that "Eleventh Amendment immunity applies only if the judgment *must*, under all circumstances, be paid out of state funds." *Id.* at 1577 (emphasis in original) (citing *Travelers Indemnity Co. v. School Board of Dade County*, 666 F.2d 505, 509 (11th Cir. 1982)). That single decision, however, does not create a conflict requiring review on *certiorari*. The portion of the *Travelers Indemnity* decision on which the *Jackson* Court relies is nothing more than a paraphrase of this Court's holding in *Edelman v. Jordan*, 415 U.S. 651

(1974). And, as this Court has itself made clear, "*Edelman* did *not* hold . . . that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought." *Cory v. White*, 457 U.S. 85, 90-91 (1982) (emphasis added). *See also Seminole Tribe*, ___ U.S. ___, 116 S. Ct. 1114, 1124 (1996); discussion below. Thus, the Eleventh Circuit's decision in *Jackson* is not only in conflict with the decisions of the other Courts of Appeals, but more importantly, of this Court. It should, therefore, be disregarded as a basis for granting *certiorari* in this case.

B. This Court Has Already Resolved Any Arguable Uncertainty.

The lack of meaningful conflict among the circuits is not surprising. This Court has consistently held that the Eleventh Amendment bars all suits by private parties against unconsenting states and state entities without regard to the type of relief requested by the plaintiff or impact on the public treasury. As this Court explained recently in its most recent decision addressing the scope of the Eleventh Amendment:

> The Eleventh Amendment does not exist solely in order to "preven[t] federal court judgments that must be paid out of a State's treasury," *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. [30], ___, 115 S. Ct. 394, 404 (1994); it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct and Sewer Authority*, 506 U.S. [139,] 146.

Seminole Tribe, 116 S. Ct. at 1124. *See also Alabama v. Pugh*, 438 U.S. 781 (1978); *Cory v. White*, 457 U.S. at 90 (quoting *Edelman*, 415 U.S. at 663) (expressly rejecting the view that the Eleventh Amendment applies only to "suits 'by private parties seeking to impose a liability which must be paid from the public funds in the state treasury.' "); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984) ("a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain *or* interfere with the public administration *or* if the effect of the judgment would be to restrain the Government from acting or to compel it to act." (emphasis added)).

The analysis in *Hess*, while not directly applicable to single state entities like the State Bar of Wisconsin (*see Hess*, 513 U.S. at ___, 115 S. Ct. at 402), is also illustrative. In *Hess*, this Court placed little emphasis on the issue of whether a judgment would have an impact on a state treasury until *after* it had determined that other indicators of immunity pointed in opposite directions. *Id.* at ___, 115 S. Ct. at 404; *Mancuso v. New York State Thruway Authority*, 86 F.3d at 293 (only if other indicators of immunity are evenly balanced will treasury factor control). *See also Hess*, 513 U.S. at ___, 115 S. Ct. at 400 (recognizing that while the initial impetus for the Eleventh Amendment was fear of damage claims, "current Eleventh Amendment jurisprudence emphasizes the integrity retained by each State in our federal system.").[6]

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[6] The fact that this Court has granted a petition for writ of *certiorari* in *Regents of the University of California v. Doe*, No. 95-1694, does not support petitioner's argument that the Court

C. The Lower Courts Are Unanimous In Holding That Integrated Bars Are Entitled To Eleventh Amendment Immunity.

As further evidence that no conflict or confusion need be addressed by the Court on this issue, lower courts are unanimous in their application of this Court's Eleventh Amendment analysis to integrated state bars. Every Court of Appeals faced with the issue of sovereign immunity for an integrated state bar has recognized that those bars are agents or agencies of their respective supreme courts and subject to those courts' ultimate control. Thus, each court has held that an integrated bar is immune from suit in federal court under the Eleventh Amendment. *Kaimowitz v. The Florida Bar*, 996 F.2d 1151 (11th Cir. 1993); *Lewis v. Louisiana State Bar Association*, 792 F.2d 493 (5th Cir. 1986); *Krempp v. Dobbs*, 775 F.2d 1319 (5th Cir. 1985) (Texas Bar); *Lupert v. California State Bar*, 761 F.2d 1325 (9th Cir. 1985); *Clulow v. State of Oklahoma*, 700 F.2d 1291, 1299 n.11 (10th Cir. 1983); *Ginter v. State Bar of Nevada*, 625 F.2d 829 (9th Cir. 1980). *See also Burcher v. McCauley*, 871 F. Supp. 864, 865 n.1 (E.D. Va. 1994) (Virginia Bar); *Cohran v. State Bar of Georgia*, 790 F. Supp. 1568,

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should grant his petition here; it does just the opposite. If this Court believes it necessary to clarify how the impact on a state treasury figures into Eleventh Amendment jurisprudence, it will do so in *Regents*. In any event, unlike *Regents*, the issue is irrelevant to the outcome of this case. Under Wisconsin law, State Bar funds are state funds. 48 Op. Att'y Gen. at 34-35. Thus, even if the impact on a state treasury were the only issue determining whether the Eleventh Amendment applies, the dismissal of petitioner's claims here was proper.

1565 (N.D. Ga. 1992). There is no need and no reason for this Court to address the issue further.

II. PETITIONER'S MOTION TO ADD NEW PARTIES AND NEW CLAIMS WAS PROPERLY DENIED WHERE THE ONLY ISSUE REMAINING ON REMAND WAS JURISDICTIONAL, DISCOVERY HAD BEEN COMPLETED AND THE NEW CLAIMS WERE ALREADY THE SUBJECT OF A PARALLEL PROCEEDING.

While this case was on appeal the first time, the Wisconsin Supreme Court amended the dues reduction rule challenged by petitioner. After remand, petitioner attempted to amend his complaint to add the then-members of the Bar's Board of Governors and to challenge the revised rule. His motion was denied. Petitioner argues that denial was an abuse of discretion which this Court should review on *certiorari*. This is so, he argues, because the Court of Appeals ruled that there was a "flat-out ironclad prohibition on any complaint amendment" where an appellate court remands a case for determination of a single issue. Petition at 24. Petitioner mischaracterizes the Court of Appeals' decision and the facts of this case. Moreover, even if petitioner's characterization were accurate, the error he asserts consists of no more than erroneous factual findings or the misapplication of law. Neither warrants this Court's review on *certiorari*. United States Supreme Court Rule 10.

The decision to grant or deny the motion to amend is within the sound discretion of the district court and will be overturned only where the court abused its discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962). A court abuses its

discretion when it fails to justify its decision to deny leave to amend, *id.* or bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). The court here did none of those things.

First, the district court explained the basis for the decision to deny petitioner's motion: (1) the proposed amendment sought to add new parties and to challenge a new rule, so it would have significantly expanded the litigation, required significant additional preparation by the court and defendant, and unduly prejudiced the defendant, (2) the additional burden which would have resulted from granting the motion was entirely unnecessary in light of the fact that a suit raising the same claims sought to be added by amendment was already pending in another court (*Thiel*), and (3) it was beyond the scope of the Court of Appeals' remand. (App. 19a-21a)

Second, contrary to petitioner's statements, the Court of Appeals did not affirm the district court because its mandate prohibited the amendment. Rather, it held that the district court's decision and the reasons it gave for that decision were within the bounds of its discretionary authority and consistent with the mandate. (App. 2a) Moreover, since *Thiel* had since upheld the constitutionality of the Bar's current dues reduction rule (adversely to petitioner), there was no longer any reason to "go back to Square One." (*Id.*)

Third, the lower courts' rulings were consistent with the law upholding denial of a motion to amend where it would be futile, or where it would be prejudicial to the

defendant because it would raise entirely new and separate claims and add new parties, and when the amendment would require expensive and time consuming new discovery. *See, e.g., Foman*, 371 U.S. at 182; *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968 (6th Cir. 1973), *cert. denied*, 416 U.S. 939 (1974); *Sturdevant v. Haferman*, 798 F. Supp. 536 (E.D. Wis. 1992); *Conroy Datsun Ltd. v. Nissan Motor Group*, 506 F. Supp. 1051 (N.D. Ill. 1980); *McCann v. Frank B. Hall & Co.*, 109 F.R.D. 363 (N.D. Ill. 1986). *See also generally* 6 Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE § 1487 n.9 (1990).

Finally, those rulings were factually correct. Petitioner argues that the district court "clearly erred when it stated that the complaint amendment represented 'a completely new claim that is dissimilar to the issues remaining, thus expanding the scope of this lawsuit.' " Petition at 27-28. It is petitioner who is in error. At the time petitioner filed his motion to amend, the only remaining issue in this action was whether his claims for retroactive relief against the State Bar of Wisconsin were barred by the Eleventh Amendment. His claims for injunctive relief against the 1992 dues reduction rule had already been dismissed, as had his claims for retroactive relief against the justices of the Wisconsin Supreme Court and the Bar's Executive Director. What he sought by amending his complaint was to add numerous additional individual defendants and to challenge the new rule. His new claims were completely dissimilar to the jurisdictional issue which remained, would have resulted in substantial additional burdens on both the court and defendant, and were completely unnecessary because the same rule was being

challenged contemporaneously in *Thiel*. Thus, the court properly denied the motion to amend.

CONCLUSION

For all of the reasons discussed above, respondent State Bar of Wisconsin respectfully submits that the petition for a writ of certiorari should be denied.

Dated this 17th day of January, 1997.

Respectfully submitted,

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Judicial Council Committee's Note, 1979: The following rules, called the state bar rules, govern the state bar of Wisconsin and its members. SCR 10.01 is in the 1977 Wisconsin statutes as section 758.25. SCR 10.02 to SCR 10.14 were originally adopted by the supreme court on December 7, 1956, effective January 1, 1957. They were amended on February 9, 1972; June 16, 1975; November 1, 1976; November 18, 1977; March 6, 1978; and December 14, 1978. The rules were originally numbered 1 to 14 and have been clarified and numbered SCR 10.02 to SCR 10.14 for uniformity and convenience. See appendix for bylaws for state bar of Wisconsin. Certain provisions relating to fees will be contained in SCR 40.16.

Note: SCR Chapter 10 was amended November 11, 1980; June 1, 1983; January 21, 1986; February 21, 1986; October 21, 1987; April 11, 1989; January 22, 1990;

November 6, 1990; March 13, 1992; May 7, 1992; July 1, 1992; April 14, 1993; March 21, 1995.

SCR 10.01 State bar of Wisconsin.

(1) There shall be an association to be known as the "state bar of Wisconsin" composed of persons licensed to practice law in this state, and membership in the association shall be a condition precedent to the right to practice law in Wisconsin

(2) The supreme court by appropriate orders shall provide for the organization and government of the association and shall define the rights, obligations and conditions of membership therein, to the end that the association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice.

SCR 10.02 Organization of the state bar of Wisconsin.

(1) Creation of Association. All persons licensed to practice law in this state are organized as an association to be known as the "state bar of Wisconsin," subject to the provisions of this chapter. The rules of this chapter, which are adopted in the exercise of the court's inherent authority over members of the legal profession as officers of the court, may be referred to as "state bar rules." The state bar may, for the purpose of carrying out the purposes for which it is organized, sue and be sued, enter into contracts, acquire, hold, encumber and dispose of real and personal property.

(2) Purposes. The purposes of the association are to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to conduct a program of continuing legal education; to assist or support legal education programs at the preadmission level; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform and the relations of the bar to the public and to publish information relating thereto; to carry on a continuing program of legal research in the technical fields of substantive law, practice and procedure and make reports and recommendations thereon within legally permissible limits; to promote the innovation, development and improvement of means to deliver legal services to the people of Wisconsin; to the end that the public responsibility of the legal profession may be more effectively discharged.

(3) Definition. In this chapter "state bar" means the state bar of Wisconsin.

SCR 10.03 Membership.

(1) Persons included in membership. As of the effective date of this rule, membership of the state bar consists of all those persons who on that date are licensed to practice law in this state. After the effective date of this rule, the membership includes all persons who become

licensed to practice law in this state; subject in each case to compliance with the conditions and requirements of membership. Residence in this state is not a condition of eligibility to membership in the state bar.

(2) Enrollment. Every person who becomes licensed to practice law in this state shall enroll in the state bar by registering his or her name with the association within 10 days after admission to practice. Every change after enrollment in any member's office address shall be reported promptly to the state bar.

(3) Classes of membership.

(a) The members of the state bar are divided into 4 classes: active members, judicial members, inactive members and emeritus members. The class of active members includes all members of the state bar except the judicial members and inactive members. The class of inactive members includes those persons who are eligible for active membership but are not engaged in the practice of law in this state and have filed with the secretary of the association written notice requesting enrollment in the class of inactive members. Judges of courts of record, full-time family court commissioners, full-time court commissioners, U.S. bankruptcy judges, U.S. magistrate judges and retired judges who are eligible for temporary judicial assignment and are not engaged in the practice of law are classed as judicial members, except that any judicial member may elect to become an active member with all rights of active membership except to hold office as an officer or governor or to practice law. The class of emeritus members includes those persons who are either active or inactive members in good standing but who are

at least 70 years of age and have filed with the executive director of the association a written notice requesting enrollment in the class of emeritus members. An emeritus member has all the privileges of membership in the state bar and need not pay membership dues for the years following the year in which he or she attains the age of 70.

(b) Any inactive member in good standing and any judicial member who is no longer serving in a judicial office may change his or her classification to that of an active member by filing with the secretary a written request for transfer to the class of active members and by paying the dues required of active members. No inactive member who has not actively practiced law in this state or in another state during the last 10 years may be transferred to active membership until the transfer is approved by the supreme court except a judicial member who is no longer serving in a judicial office shall be classified as an active member upon his or her written request.

(c) No judicial or inactive member may practice law in this state or hold office or vote in any election conducted by the state bar. No person engaged in the practice of law in this state in his or her own behalf or as an assistant or employe of an active member of the state bar, or occupying a position, the duties of which require the giving of legal advice or service in this state may be enrolled as an inactive member.

(4) Only active members may practice law. No individual other than an enrolled active member of the state bar may practice law in this state or in any manner

purport to be authorized or qualified to practice law. A judge in this state may allow a nonresident counsel to appear in his or her court and participate in a particular action or proceeding in association with an active member of the state bar of Wisconsin who appears and participates in the action or proceeding. Permission to the nonresident lawyer may be withdrawn by the judge granting it if the lawyer by his or her conduct manifests incompetency to represent a client in a Wisconsin court or by his or her unwillingness to abide by the rules of professional conduct for attorneys and the rules of decorum of the court.

(5) Membership dues and reduction of dues for certain activities.

(a) The annual membership dues for state bar operations for an active member shall be established as provided herein. Other classes of members shall pay the fraction of the dues of an active member as follows: Supreme Court Justices, the full amount; inactive member, one-half; judicial members, two-thirds; members admitted to practice three years or less, one-half. For purposes of determining an active member's dues status based on number of years admitted, there shall be no proration based on exact month and year of admission. A fiscal year for which any dues are required to be paid under Bylaw 1, Section 2 shall count as a full year and a fiscal year for which no dues payment is required shall not count as a year. A change in the dues of an active member for state bar operations may be made by the board of governors or as set forth herein. The state bar shall include in the dues statement each year the amount necessary to pay the costs of the Board of Attorneys

Professional Responsibility and of the continuing legal education functions of the Board of Bar Examiners as approved by the Supreme Court. Judicial members other than Supreme Court Justices are not liable to pay the portion of the annual dues for the costs of these boards. The state bar shall show separately on its annual dues statement the portion of the total dues for state bar operations and each of the boards.

(b) 1. The State Bar may engage in and fund any activity that is reasonably intended for the purposes of the association. The State Bar may not use compulsory dues of any member who objects to that use for political or ideological activities that are not reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services. The state bar shall fund those political or ideological activities by the use of voluntary dues, user fees or other sources of revenue.

2. Prior to the beginning of each fiscal year, the state bar shall publish written notice of the activities that can be supported by compulsory dues and the activities that cannot be supported by compulsory dues. The notice shall indicate the cost of each activity, including all appropriate indirect expense, and the amount of dues to be devoted to each activity. The notice shall set forth each member's pro rata portion, according to class of membership, of the dues to be devoted to activities that cannot be supported by compulsory dues. The notice shall be sent to every member of the state bar together with the annual dues statement. A member of the state bar may withhold the pro rata portion of dues budgeted for activities that cannot be supported by compulsory dues.

3. A member of the state bar who contends that the state bar incorrectly set the amount of dues that can be withheld may deliver to the state bar a written demand for arbitration. Any such demand shall be delivered within 30 days of receipt of the member's dues statement.

4. If one or more timely demands for arbitration are delivered, the state bar shall promptly submit the matter to arbitration before an impartial arbitrator. All such demands for arbitration shall be consolidated for hearing. No later than 7 calendar days before the hearing, any member requesting arbitration shall file with the arbitrator a statement specifying with reasonable particularity each activity he or she believes should not be supported by compulsory dues under this paragraph and the reasons for the objection. The costs of the arbitration shall be paid by the state bar.

5. In the event the decision of the arbitrator results in an increased pro rata reduction of dues for members who have delivered timely demands for arbitration for a fiscal year, the state bar shall offer such increased pro rata reduction to members first admitted to the state bar during that fiscal year and after the date of the arbitrator's decision.

(6) Penalty for nonpayment of dues. If the annual dues of any member remain unpaid 120 days after the payment is due, the membership of the member may be suspended in the manner provided in the bylaws; and no person whose membership is so suspended for nonpayment of dues may practice law during the period of the suspension.

(7) Voluntary resignation of membership. If a member of the state bar files with the executive director a written notice of the member's surrender of his or her license to practice law and the acceptance by the supreme court of his or her resignation in the state bar, the person shall then cease to be a member of the state bar and his or her name shall be removed from the membership register.

(8) Avoidance of hardship. The board of governors may, in any case in which to do otherwise would result in hardship or injustice, permit the retroactive enrollment of members and waive penalties prescribed for delinquency in the payment of membership dues.

SCR 10.04 Officers.

(1) Titles; Nomination and Election. The officers of the state bar include a president, a president-elect, a chairperson of the board of governors, a secretary and a treasurer, who shall be nominated and elected in the manner provided by the bylaws. Only active members of the state bar residing and practicing law in Wisconsin are eligible to serve as officers of the association. The term of office of the president, president-elect and chairperson of the board of governors is one year. The term of the secretary and the treasurer is 2 years, with the secretary elected in even-numbered years and the treasurer elected in odd-numbered years. The term of each officer runs until the qualification of a successor.

(2) Duties of officers.

(a) President. The president is the chief executive officer of the association. He or she shall be a member-at-large of the board of governors and shall preside at all meetings and assemblies of the association and the executive committee. He or she shall make the appointments to and designate the chairperson of all standing committees, create and appoint special committees, and be a member, ex officio, of every committee.

(b) President-elect. The president-elect shall be a member-at-large of the board of governors and the executive committee and shall perform all other duties assigned to him or her by the president or board of governors or under these rules or the bylaws. At the expiration of the one-year term of office of the president, the president-elect shall succeed to the office of president.

(c) Chairperson, board of governors. The chairperson of the board of governors shall be elected from the board membership by its members and shall be a member-at-large of the board of governors after his or her election. The chairperson shall be a member of the executive committee ex officio and shall preside at all meetings of the board of governors. The chairperson shall perform the duties of the president in the absence or disability of the president or in the event of a vacancy in the office of president.

(d) Secretary. The secretary shall be a member-at-large of the board of governors. The secretary shall confer with and generally supervise the executive director and the administrative staff of the state bar as to the keeping of proper minutes and records, the maintenance of correct membership files and mailing lists and the

general operation of the headquarters office and he or she shall make recommendations thereon to the board of governors as required.

(e) Treasurer. The treasurer shall be a member-at-large of the board of governors. The treasurer shall confer with and generally supervise the executive director and administrative staff of the state bar as to the methods and procedures used in the receipt, collection and safekeeping of all funds of the state bar and the procedures for disbursement and audit of the funds. The treasurer shall assist the executive committee in preparing the annual budget and in presenting it to the board of governors and shall make recommendations to the board of governors as to the association's financial affairs, as required.

(3) Compensation. The officers of the association shall receive no compensation for their services, but shall receive reimbursement of their expenses as authorized and directed by the board of governors.

SCR 10.05 Board of governors.

(1) Composition of board. The affairs of the association shall be managed and directed by a board of governors consisting of the 5 officers of the association and the immediate past-president of the association, all of whom shall be ex officio members-at-large of the board, not fewer than 34 members elected from the state bar districts established under sub. (2), one member selected by the young lawyers division pursuant to its bylaws, one member selected by the government lawyers division pursuant to its bylaws, three governors selected by the

nonresident lawyers division pursuant to its bylaws, and three nonlawyers appointed by the supreme court for staggered two-year terms. No person appointed by the supreme court shall serve more than two consecutive full terms. The rights and powers of the ex officio members of the board are the same as those of elected members. All past-presidents of the Wisconsin bar association or of the state bar of Wisconsin, the Wisconsin state delegate to the American Bar Association house of delegates and the deans of the Marquette university and university of Wisconsin law schools are entitled to floor privileges, but without voting privileges.

(2) State bar districts.

(a) For the purpose of conducting elections of the members of the board of governors, the board of governors shall divide the state into 16 state bar districts comprising specified counties and shall establish the number of members of the board of governors to be elected from each district.

(b) The number of members of the board of governors elected from each state bar district shall be in proportion to the number of active members entitled to vote residing in the district and shall take into consideration all of the following:

1. The composition of the judicial administrative districts established by sec. 757.60, Stats.

2. The geographical area of each state bar district.

3. All existing multi-county bar associations.

4. The representation of members in each state bar district afforded by members of the board of governors selected by divisions of the association under sub. (1).

(c) Every 10 years, commencing January 1, 1995, the board of governors shall submit to the court a proposed redistricting map dividing the state bar into districts in accordance with the requirements in par. (b).

(d) Notice, filing, review, hearing and adoption of a redistricting proposal submitted under par. (c) shall be provided in SCR 10.13(2) for amendment of bylaws.

(3) Term; qualifications; nomination and election. The term of office of each elected member of the board of governors is 2 years, commencing on July 1 next following his or her election. No person is eligible to vote in a district for governor or to serve on the board of governors from a district unless he or she is an active member of the association and maintains in the district his or her principal office for the practice of law. No person is eligible for election to the board of governors for more than 2 consecutive terms. The eligibility of any person to serve as a member of the board of governors from any state bar district ceases upon removal of the person's principal office for the practice of law from the district. Nominations and elections of members of the board of governors shall be conducted in accordance with the provisions of the bylaws.

(4) Functions.

(a) The board of governors has general charge of the affairs and activities of the association. It may:

1. Fix the time and place of the annual meeting of members of the association.

2. Make appropriations and authorize disbursements from the funds of the state bar in payment of the necessary expenses of the association.

3. Engage and define the duties of employes and fix their compensation.

4. Receive, consider and take action on reports and recommendations submitted by committees, sections and the assembly of members of the association at any annual or special meeting.

5. Arrange for publication of an official state bar bulletin or journal.

6. Conduct investigations of matters affecting the association or the practice of law or the discipline of members of the association.

7. Fill vacancies arising in the membership of the board of governors or in any office except the office of president. In each case the person appointed to fill the vacancy shall hold office for the unexpired term.

8. Adopt bylaws and regulations, not inconsistent with this chapter, for the orderly administration of the association's affairs and activities.

(b) The board of governors shall meet at least 4 times each year. Twenty-three members present at any meeting constitutes a quorum. Special meetings of the board of governors may be called in accordance with the bylaws.

(c) The board of governors shall establish and maintain standing committees having respectively the functions defined in the bylaws. The board of governors may create additional standing committees and special committees and may define the authority and functions of those standing and special committees.

(d) The board of governors shall establish and maintain sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. New sections may be established and existing sections may be consolidated or discontinued by the board of governors. Each section shall be governed by bylaws not inconsistent with this chapter or state bar bylaws. Section bylaws and amendments thereto become effective upon approval of the board of governors.

(e) A section may express a position on a matter involving a substantial issue of public policy under the following conditions:

1. The matter is one on which the section's views would have particular relevance.

2. The position is adopted in accordance with section bylaws.

3. The position is clearly taken only on behalf of the section.

4. The section charges annual dues at least equal to the cost of its legislative program so that the cost need not be borne by section nonmembers. The executive

committee or board shall receive a summary of section positions on matters involving substantial issues of public policy prior to their publication but inaction by the executive committee or board shall not be construed as support of such positions. No committee of the association may publicly express any conclusion or opinion respecting any substantial issue of public policy without having procured previous authorization from either the board of governors or the executive committee of the association. This prohibition is not applicable to the public release of reports made by committees to the board of governors prior to action thereon by the board, unless the board has otherwise ordered. If any committee or section of the association expresses publicly any conclusion or opinion on matters other than substantial issues of public policy, the expression shall indicate that the conclusion or opinion is that of the section or committee from which it emanates, rather than the conclusion or opinion of the state bar.

(f) The members of the board of governors shall receive no compensation for services to the association, but they and also the members of committees and the officers and directors of sections and of the young lawyers division, the government lawyers division and the nonresident lawyers division may be reimbursed for necessary expenses in the performance of their duties.

(g) A complete summary of the minutes of each meeting of the board of governors shall be promptly printed in the Wisconsin bar bulletin, with a notation that any interested person may obtain a copy of the minutes on request to the secretary.

(h) The board of governors shall establish and maintain a young lawyers division. Membership in the division shall be voluntary. Those eligible for membership in the young lawyers division shall be any member of the state bar under the age of 36 years or any member, irrespective of age, during the first 5 years following admission to the bar. This division shall be governed by bylaws not inconsistent with state bar rules and bylaws. The division bylaws and amendments thereto become effective upon approval of the board of governors. The young lawyers division shall stimulate the interest of young lawyers in the objectives and programs of the state bar and carry on projects which will be of assistance to young lawyers.

(i) The board of governors shall establish and maintain a government lawyers division. Membership in the division shall be voluntary. Those eligible for membership in the government lawyers division shall be any member of the state bar who is a salaried employee of any government. This division shall be governed by bylaws not inconsistent with state bar rules and bylaws. The division bylaws and amendments thereto become effective upon approval of the board of governors. The government lawyers division shall promote effective collaboration between the private and public sectors of the bar and provide for the participation of publicly employed members in the governance of the state bar.

(j) The board of governors shall establish and maintain a non-resident lawyers division. Membership in the division shall be voluntary. Those eligible for membership in the non-resident lawyers division shall be any member of the state bar who has an address of record

outside the state of Wisconsin. This division shall be governed by bylaws not inconsistent with state bar rules and bylaws. The division bylaws and amendments thereto become effective upon approval of the board of governors. The non-resident lawyers division shall carry on projects which will be of assistance to members outside the state of Wisconsin and provide for the participation of members outside Wisconsin in the governance of the state bar.

SCR 10.06 Executive committee.

(1) Members; selection. The executive committee consists of the president, president-elect, the immediate past-president, the chairperson of the board of governors and 4 additional members elected annually by the board of governors from among its members at its June meeting. A vacancy occurring in the selected membership may be filled by action of the board of governors.

(2) Powers. The executive committee may exercise all the powers and perform all the duties of the board of governors between the meetings of the board except the executive committee shall not, unless otherwise authorized by the board of governors: amend the bylaws; make rules or regulations governing nominations or elections; prescribe regulations for proceedings before grievance committees; or initiate the taking of any referendum or poll of members of the association. The executive committee shall directly receive and act upon all reports of committees on disciplinary matters without reporting to

the board of governors. The minutes relating to disciplinary matters shall be kept separate from the general minutes and shall be confidential. The executive committee shall prepare an annual budget for submission to the board of governors and shall perform such other duties as the board of governors may prescribe. Unless otherwise ordered by the board of governors, the executive committee shall not express publicly any opinion on any matter including legislation of major public interest or concern or of major importance to the members of the association. A complete summary of the general minutes of each meeting of the executive committee shall be promptly printed in the Wisconsin bar bulletin, with a notation that any interested person may obtain a copy of the general minutes upon request to the secretary.

(3) Meeting; quorum. The executive committee shall meet at the call of the president, or at the call of the executive director upon the written demand of at least 3 of its members. All members shall be given at least 48 hours' notice by mail or telephone of the time and place of any meeting. Five members present at a meeting constitutes a quorum. No action may be taken by the committee except upon the concurrence of at least 5 members. The concurrence may be registered by mail or telephone.

SCR 10.07 Meetings of the association.

(1) Annual meeting. There shall be an annual meeting of the members of the state bar each year. The board of governors shall determine the time and place of the annual meeting and shall arrange a suitable program.

(2) Assembly of members. An assembly of the members of the state bar may be held at each annual and midwinter meeting for the purpose of discussing any issues of association public policy.

SCR 10.08 Referendum procedure.

(1) Time of holding. All referendums shall be conducted in any calendar year at the same time as and simultaneous with the election of officers and members of the board of governors of the state bar.

(2) Time for filing request. In order to be submitted to the membership in the regularly scheduled spring elections, petitions for referendum initiated by members of the state bar must be filed at the state bar headquarters no later than the first business day in January. Nothing in this rule is intended to prohibit the submission of referendum petitions at any time in the preceding calendar year after the completion of state bar elections for that year. Any referendum authorized by the board of governors shall be authorized on or before February 28 of the calendar year in which the referendum is to be held.

(3) Subject matter of referendum.

(a) A referendum may inquire as to the opinion of members on any matter of public policy which is properly the subject of any action by the association, including proposals for change in the rules or bylaws of the association, except no referendum may be held on administrative or personnel matters and expenses or retroactively on dues.

(b) The same substantive question shall not be submitted to the members by referendum more frequently than one time in two calendar years.

(4) Governors may initiate. The board of governors may, by the affirmative vote of two-thirds of its membership, refer to the active members of the association for determination by mail ballot any appropriate question of public policy, as provided in sub. (3).

(5) Members may initiate by petition. When required by petition as set forth herein, the board of governors shall submit for determination by the members of the association any question appropriate for referendum, as provided in sub. (3).

(a) The petition shall succinctly and clearly state the question to be submitted by referendum.

(b) A referendum must be requested by petitions containing the signatures of 1,000 members of the state bar eligible to vote.

(c) Each petition shall contain (i) the member's signature and full name clearly printed or typed, (ii) the address of the member's principal office for the practice of law and (iii) the date on which the petition was signed.

(d) Each petition shall be circulated by an active member in good standing of the state bar.

(e) The petitions shall be verified by the circulator who shall swear that the circulator personally obtained all signatures set forth on the petition and knows them to be members of the state bar as represented therein.

(f) The 1,000 signatures required shall include not less than 50 signatures from each of six separate districts from which members of the state bar board of governors are elected.

(g) All signatures must be obtained within a period of ninety days before the date the petition is filed.

(h) The petition shall designate the person to be notified of any insufficiency or improper form under sub. (7).

(j) Members can obtain a petition form from the executive director.

(k) Non-resident members are considered to reside in a single, non-resident district.

(6) Procedure for filing petition. The petition must be complete when filed with the state bar headquarters. Upon filing, the petition will be examined by the state bar executive director or his designee in order to determine the following: (a) whether the question is properly the subject of a referendum; (b) whether the signatures are of members of the state bar eligible to vote; (c) whether the signatures satisfy the geographic distribution and time requirements set forth in sub. (5)(f) and (g); (d) whether the petition is otherwise in order as required by these rules. The ruling of the executive director shall be communicated to the person designated in the petition as soon as practicable and within two weeks of the date the petition is filed.

(7) Framing the question. Upon receipt by the state bar of a referendum petition as described above and certification by the executive director as to the validity of

the petition, the state bar president shall appoint a committee to frame the exact question to be submitted to the members. That committee shall include the person designated in the petition. The committee shall be responsible for framing the question in a form that is clear, intelligible and meaningful.

(8) Final certification by board of governors. Any dispute as to the certification of the validity of the petition by the executive directors or the framing of the question by the special committee described above, shall be submitted to the board of governors who shall determine the validity of the petition and the form in which the question shall appear on the referendum ballot.

(9) Publication of question. As to all questions to be submitted to the members by referendum, space in a reasonable amount shall be provided to both the proponents and the opponents of the proposition. This space shall be made available without charge in the state bar's official publication one month prior to mailing of the referendum ballots or in another state bar mailing to all eligible voters. State bar mailing lists shall be equally available at the same costs to both proponents and opponents of any referendum.

(10) Conduct of election. The mailing of the ballots, the return of the ballots, the counting of the ballots and the reporting of the results shall be conducted in the same manner as set forth in article 3, sections 4 through 8 of the bylaws for the election of the board of governors.

(11) Binding effect. A referendum receiving an affirmative vote of a majority of the votes cast, provided that at least 25% of the eligible voters vote, shall establish

state bar policy until such time as that policy may be changed or modified according to the requirements of supreme court rules or state bar bylaws.

SCR 10.09 Disbursements.

(1) The board of governors shall make necessary appropriations for disbursements from the funds in the treasury to pay all necessary expenses of the association, its officers and committees. It shall be the duty of the board of governors to cause proper books of account to be kept and to procure an annual audit thereof by a certified public accountant.

(2) A financial statement showing assets, liabilities, receipts, and disbursements of the state bar shall be published in the state bar bulletin prior to the annual meeting. A copy of the annual audit shall be filed with the supreme court.

SCR 10.10 Committee to review bar performance.

The supreme court shall appoint a committee to review the performance of the state bar in carrying out its public functions at such time as the court deems it advisable. The supreme court shall determine in its order of appointment the size and composition of the committee. The state bar shall pay the expenses of the committee.

SCR 10.11 Executive director.

There shall be an executive director of the state bar who is the chief executive officer of the administrative staff and in direct charge of the state bar office, its

records, property and equipment. The executive director shall be hired by the board of governors under terms of employment and compensation fixed by the board. The executive director shall devote full time to the affairs of the state bar. Subject to the general control of the officers, executive committee and board of governors and as appropriate and consistent with the requirements of these rules and the bylaws, the executive director shall:

(1) Attend meetings of the executive committee and board of governors and keep and disseminate the minutes of the meetings.

(2) Collect, deposit and disburse the association's funds pursuant to the budget and shall invest surplus funds at the direction of the executive committee.

(3) Maintain membership lists and individual member files.

(4) Advise and assist the officers, governors, sections and committees.

(5) Make the arrangements for association meetings.

(6) Perform other duties as directed by the board of governors or officers or as prescribed by this chapter or the bylaws.

SCR 10.12 Official publication; notice to members.

The Wisconsin bar bulletin or its successor is the official publication of the state bar of Wisconsin. All official notices shall be published therein or mailed first class to members entitled thereto at their address of record. Such publication shall constitute notice to all

members. The publication shall be sent by mail to all members at their address of record.

SCR 10.13 Amendment.

(1) Amendment of rules. Proposals for amendment or abrogation of provisions of this chapter may be presented to the supreme court by petition of the board of governors or by petition approved by the members of the association through the referendum procedure set forth in SCR 10.08. Hearing upon such a petition will be pursuant to notice in such manner as the court directs.

(2) Amendment of bylaws. The provisions of the bylaws of the state bar of Wisconsin are subject to amendment or abrogation by resolution adopted by vote of two-thirds of the members of the board of governors, or action of the members of the association expressed through the referendum procedure defined in SCR 10.08. When any change in the bylaws has been made by the board of governors the secretary shall publish notice of the change, including a copy of the amendatory resolution, in the Wisconsin bar bulletin and shall file a certified copy thereof with the clerk of the supreme court. A petition for review of any such change in the bylaws will be entertained by the court if signed by 25 or more active members of the association and filed with the clerk of the court within 60 days after publication of notice of the change. Hearing upon such a petition will be pursuant to notice in such manner as the court directs.

Supreme Court, U.S.
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No. 96-975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOHN CROSETTO,

Petitioner,

vs.

STATE BAR OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

AMEDEO GRECO
Counsel of Record for Petitioner
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Mullaney v. Anderson, 342 U.S. 415 (1952) 9

Sonnenfeld v. City and County of Denver, 100 F.3d. 744 (10th Cir. 1996) 2

Teachers v. Hudson, 475 U.S. 292 (1986) ..... *passim*

Thiel v. State Bar of Wisconsin, 94 F.3d. 399 (7th Cir. 1996) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. amend XI ..... *passim*

RULES

Fed. R. Civ. P. 15. 8

OTHER AUTHORITIES

48 Op. Atty. Gen. 30 (Wis. 1959) 4

75 Op. Atty. Gen. 153 (Wis. 1986) 4

18 Wright, Miller & Kane, Federal Practice & Procedure § 4478 (1990) 8

Respondent's Brief In Opposition ("Opp.") is a study in avoidance.

Respondent tries to avoid review by incorrectly describing the circuit court split identified in the Petition. That is why Respondent's Counterstatement to Question 1 (Opp. i) is so generalized, as that enables Respondent to avoid dealing with the precise question presented and the clear circuit split on that question.

But, no matter how hard Respondent tries, it cannot avoid one essential truth: the Seventh Circuit—unlike the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits—is the only circuit court to rule that sovereign immunity can be granted to a claimed arm of the state without inquiring whether a money judgment against it—here about $3,000—will affect the state treasury.

This case thus presents an appropriate vehicle for the Court to decide these conflicting principles of constitutional law because they are not limited to the particular facts of this case. Rather, this case presents a straight yes or no answer to a legal question of national importance which is dividing the courts below and which will go on dividing them until the Court answers it.

This case also asks what procedural requirements unified bars must follow under *Keller v. State Bar of California,* 496 U.S. 1 (1990), and *Teachers v. Hudson,* 475 U.S. 292 (1986). This issue involves not only Wisconsin's 18,000 attorneys, but also all attorneys in the country's 35 or so unified bars.

Respondent also avoids mentioning what will happen if review is denied. Denial will enable Respondent to avoid changing its dues reduction plan which violates *Keller* and *Hudson.* Denial also will enable Respondent to avoid Petitioner's prevailing party status through a simple technicality: the Seventh Circuit's flat-out refusal to let Petitioner on the

remand add nominal defendants to counter Respondent's sovereign immunity claim.[1]

Given this experience, it is hardly likely that any other bar members in Wisconsin will sue over these or any other constitutional deprivations, just as it is unlikely that any attorney will step forward to represent them. That, not review, should be avoided.

I. This Case Presents The Circuit Court Split Identified In The Petition

A. Respondent's Manufactured Conflict Is Not The Real Conflict Between the Seventh Circuit And The Other Circuits

Respondent does not dispute that there is a circuit court split between Seventh Circuit and the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth,[2] and Eleventh Circuits over whether the federal courts must inquire into whether sovereign immunity can be granted to a claimed arm of the state if a money judgment—here about $3,000—is not paid out of the state treasury.[3] Respondent similarly does not dispute that the

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[1] Respondent also tries to avoid the truth by challenging the accuracy of Petitioner's Statement of Facts (Opp. 1), but thereafter only challenges one purported factual error. Opp. 7, n. 4. As related at pp. 9, 10, *infra*, it is Respondent who errs on this point, not Petitioner. Hence, every fact in Petitioner's Statement of Facts is true and should be accepted by the Court.

[2] The Tenth Circuit ruled in *Sonnenfeld v. City and County of Denver*, 100 F.3d. 744, 749 (10th Cir. 1996), that: "The most important factor in determining whether a governmental entity is entitled to Eleventh Amendment immunity is whether a judgment against it would be paid from the state treasury." This decision supersedes *Esparza v. Valdez*, 862 F.2d. 788 (10th Cir. 1988), where the court reached a contrary conclusion. Pet. 18.

[3] Respondent does not dispute that a money judgment against it will not exceed about $3,000. Respondent instead only addresses the amount of

(continued...)

Petition accurately reports the current circuit court thinking on this issue and the Seventh Circuit's minority position. Pet. 17-21.

Instead, Respondent seeks to obfuscate the need for review by asserting that other circuit courts "have consistently held that the impact of a judgment on the state treasury is not the only factor to consider in determining whether a defendant is entitled to immunity under the Eleventh Amendment and that immunity may attach even in the absence of any fiscal impact if other factors are present." Opp. 11-12.

So what? Respondent knows that that is not the issue before the Court. Petitioner has never claimed that this is the only factor that all other circuit courts must consider. Rather, review is needed because the Seventh Circuit below, unlike every other circuit court, refuses to even consider this factor in determining whether an entity is entitled to sovereign immunity. Pet. 17-18. That is the real issue presented for review and that is the source of the circuit court split identified here.

Respondent therefore engages in a gross mischaracterization in baldly asserting: "The lack of meaningful conflict among the circuits is not surprising." Opp. 13. Since the phony conflict addressed by Respondent is not the real conflict raised in the Petition, its straw man is not relevant to the issue pending before the Court—an issue Respondent has chosen to duck by disingenuously raising a bogus issue and by thereby refusing to correctly identify the real circuit court split referenced in the Petition.

B. A Judgment Will Not Affect The State Treasury Because Respondent's Funds Are Not State Funds

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[3](...continued)
damages initially in dispute when class certification was being sought on behalf of Wisconsin's approximately 18,000 attorneys. Opp. 2.

Respondent errs in arguing that its funds are state funds and that review is not needed. Opp. 9, 15-16, n. 6.[4]

They are private funds. That is shown by Respondent's admissions that it purchased about $217,000 in private bonds with its own funds and without any state authorization; that it spent about $850,000 of its own funds in remodeling its building without any state authorization; that the state does not disburse any funds to it; that its funds are not part of the state budget; that it does not receive any general revenue funds from the state; and that membership dues are its prime source of income. (R. 510) ¶s 60-61. Hence, Respondent can use its own private funds to pay the approximately $3,000 money judgment sought here without affecting the state treasury.

C. Not All Of The Issues Herein Can Be Resolved In *Regents of the University of California v. Doe* Which Is Now Pending Before The Court

Respondent asserts that review should not be granted here because the Court in *Regents* (Case 95-1694) can "clarify how the impact on a state treasury figures into Eleventh Amendment jurisprudence . . .." Opp. 14-15, n. 6.

That, though, is not necessarily true. There is no dispute in that case that the University of California is an arm of the state

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[4]Respondent cites 48 Op. Atty. Gen. 30 (Wis. 1959) and 75 Op. Atty. Gen. 153 (Wis. 1986) in support of its claim that these are state funds. Opp. 9, 15. However, since Wisconsin's Attorney General has sometimes represented Respondent in the past, its opinions cannot be given much weight particularly where, as here, Respondent's status is a "federal question." *Keller*, 496 U.S. 11 (1990). In addition, Respondent's reliance on 75 Op. Atty. Gen. is wholly misplaced. It states: "In December of 1983, the Bar petitioned the Court to set up the State Bar as an 'official arm' of the court, acting in a quasi-judicial capacity . . .. The supreme court denied the petition . . ." *Id.* at 157. Hence, that denial establishes that Respondent is not an "official arm" of the Wisconsin Supreme Court. That being so, its funds are not state funds.

and that a legal judgment would run against the state. Here, on the other hand, Respondent has admitted: The bar is not a governmental entity" (Emphasis in original) (R. 510). Furthermore, Petitioners in *Regent* sought review over a circuit court split which centers on the effect of indemnification agreements and whether "the immunity of State entities under the Eleventh Amendment should be based solely on the legal liability of the state entity for the judgment" or whether "the immunity of State entities must be based on a prediction of the likely financial impact of a particular judgment on State resources."[5] Pet. 9.

Here, the Court is not being asked to review the circuit court split regarding indemnification agreements. Hence, there is no assurance that the Court will rule on this issue in *Regents*. Furthermore, review is still needed to address the other two Questions Presented which are not raised in *Regents*.

D. Review Is Needed To Resolve The Uncertainty Surrounding Sovereign Immunity

Respondent errs in asserting that there is no uncertainty over this issue. Opp. 13-14.

The Second Circuit in *Mancuso v. New York State Thruway Authority*, 86 F.3d. 289, 293 (2nd Cir. 1996), cert. denied, (Nov. 18, 1996), (No. 96-381), stated: "The jurisprudence over how to apply the arm-of-the-state doctrine is, at best confused." The Fourth Circuit in *Gray v. Laws*, 51 F.3d. 426, 431 (4th Cir. 1995), stated that *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S.Ct. 394 (1995), is "an opinion that is certain to generate confusion." In the Eighth Circuit, the dissenting opinion (Lay, J.) in *Hadley v. North Arkansas Community Technical College*, 76

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[5] Petitioners in *Regents* thus assert as their main argument that immunity does not depend on whether a state entity has a claim for reimbursement or indemnification against a third party. Pet. Br. 12.

F.3d. 1437, 1442 (1996), petition for cert. filed, 65 U.S.L.W. 3054 (June 24, 1996) (No. 95-2060), stated: "Today's decision amplifies the disarray of approaches applied by the lower courts when confronted with the defense of Eleventh Amendment immunity by state-created entities." Review is needed to answer such questions.

II. This Case Presents Questions Left Unaddressed In *Keller*

Keller held that unified bars should adopt "the sort of procedures described in *Hudson*," but it did not spell them out. 496, U.S., at 17. Review thus is needed to determine whether Respondent's plan is unconstitutional.

A. Respondent Does Not Dispute That Petitioner's Pending Constitutional Challenges Are Identical To Those Raised In 1992 And That They Are Covered By The Pretrial Order

Respondent does not deny that its dues plan violates *Keller* and *Hudson* because of its unlawful preclusion and exhaustion requirements. Pet. 27. Respondent also does not deny that these two constitutional challenges were first raised before the District Court in 1992 and that they are covered by the Pretrial Order. Pet. 27-29. Hence, they are not "new" claims.[6]

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[6]Respondent asserts that the District Court properly denied Petitioner's amendment because it raised new claims and new challenges to the current dues reduction plan. Opp. 18. However, Respondent does not identify these supposed claims or challenges for a very good reason: they do not exist. But, even if they did, they do not involve these two claims which have been pending since 1992. Respondent also asserts that these supposed new claims were already the subject of a parallel proceeding in *Thiel v. State Bar of Wisconsin*, 94 F.3d. 399 (7th Cir. 1996). Opp. 16-19. Respondent knows that is not true because *Thiel* did not involve the unconstitutional preclusion and exhaustion requirements found here. Hence, Petitioner could not have received the same legal relief in *Thiel* that he seeks here.

B. No Court Has Ever Ruled On The Substantive Merits Of Petitioner's Two Challenges

Respondent has not presented a counterstatement to Question 3. Opp., p. i, n.1. Instead, Respondent misleads the Court by asserting that the two challenges were decided adversely to Petitioner on his first appeal. *Id.* In fact, Respondent has stipulated that these challenges were dismissed on procedural grounds (i.e., that they were "moot" or not "ripe") and that neither the District Court nor the Seventh Circuit ever addressed their substantive merits. (R. 509), ¶6. Review therefore is needed because Respondent today is subjecting Wisconsin's approximately 18,000 attorneys to its unconstitutional dues reduction-arbitration plan.

C. Respondent's Other Practices Are Unconstitutional

Respondent does not dispute its record-keeping practices. Pet 5. It, instead, asserts that they are constitutional Opp. 10. Petitioner disagrees. It is manifestly absurd to claim that proper time records can be maintained when bar employees are not required to fill in and file their personal time sheets until up to 42 days after the fact.[7] Review thus is needed to determine whether unified bars under *Keller* can maintain such sorry practices.

III. Review Is Needed To Determine What Complaint Procedures Should Be Followed After A Circuit Court Raises A Sovereign Immunity Defense *Sua Sponte*

This issue involves all cases where, as here, a federal court raises a sovereign immunity defense *sua sponte* and then rules that a plaintiff cannot amend a complaint by naming nominal

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[7]Respondent admits that no auditor independently verified employee time records until after Petitioner raised this issue and that its auditor relies on Respondent's claims that its records are being properly kept. (R. 510) ¶11.

defendants for the purpose of preserving subject matter jurisdiction. The Seventh Circuit's decision here is manifestly unjust because it fails to recognize that a plaintiff in such a situation has the right to amend under Fed. R. Civ. P. 15 and because it prevents Petitioner from being declared a prevailing party.

Thus, Respondent does not dispute that Petitioner has brought needed changes in Respondent's unconstitutional record-keeping, time-keeping, and auditing practices and that it fired one of its employees because of the abuses uncovered in this litigation.[8] Pet. 5, 24-27.

Respondent similarly does not dispute that Petitioner needs to add the nominal defendants to the Complaint only to counter Respondent's belated sovereign immunity defense and to preserve his prevailing party status. It similarly does not dispute that all of those nominal defendants were nominal defendants in *Thiel* and that their addition here as nominal defendants is a "routine, ministerial task." Pet. 25.

Instead, Respondent argues phantom facts and wrongly asserts that the District Court did not abuse its discretion in denying this necessary amendment. This is a bogus argument. The Seventh Circuit ruled that, as a matter of law, the District Court had no discretion to exercise because: "Amendment would have been inconsistent with our mandate which required the resolution of one specific issue." Pet. App. 2a. The Seventh

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[8] Respondent asserts that Petitioner is precluded from raising these issues because the District Court decided that they were without merit and that its ruling is the "law of the case." Opp. 10. Its claim is without merit because this Court gave no reason for denying Petitioner's first petition for a writ of certiorari and thus never addressed the merits of Petitioner's claims. Hence, "questions that may have been decided do not become law of the case merely because they could have been decided . . ." 18 Wright, Miller & Kane, Federal Practice & Procedure § 4478 (1990).

Circuit did not offer an explanation as to why an amendment was prohibited on the remand after it raised a sovereign immunity defense *sua sponte*. Pet. App. 32a, n. 10. Its refusal to do so is in conflict with *Foman v. Davis*, 371 U.S. 178, 182 (1962) which requires such an explanation.

It also conflicts with *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952), where the Court allowed such an amendment under similar circumstances. Indeed, *Mullaney* is so on point that Respondent does not even try to distinguish it or even mention it.

IV. Respondent Is Not A State Entity Under *Keller* And It Is Not The Court's Agent

While Respondent now asserts that it is a state entity (Opp. 9-10) and that it is an agent of the court (Opp. 4-9), it does not dispute that it previously has represented: "The bar is not a governmental entity." (Emphasis in original.) (R. 509).

Respondent also admits that its funding does not come from the state legislature, but rather, through membership dues; that it does not admit, disbar, or suspend anyone from the practice of law; and that it does not have ultimate power to adopt a code of ethics. (R. 509) In short, it does not meet any of the criteria set forth in *Keller*, 496 U.S., at 11, for being a state agency.[9]

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[9]Respondent misrepresents the record by labeling as "false" (Opp. 7, n. 4) Petitioner's representation that Respondent "has never been told by the Wisconsin Supreme Court that it is free to disregard those procedures" which govern all Wisconsin state entities. Pet. 8. In fact, Respondent's Executive Secretary Stephen L. Smay, ("Smay"), was asked at his June 8, 1995, deposition: "And there is nothing in any of the [Supreme Court Rules] as far as you know that says the State Bar does not have to follow the other requirements established for other state agencies, isn't that correct?"

A I think that's correct. (R. 509), (Tab 30, p. 187).

(continued...)

Respondent's other assertion that it was an agent of the Wisconsin Supreme Court when it engaged in the activities in dispute was blown apart by Smay's admissions at another deposition. He admitted there were no Supreme Court Rules, decisions, or orders which authorized Respondent to establish LAWPAC, its political action committee; to conceal its LAWPAC activities; to force Petitioner to financially support LAWPAC; to maintain its record-keeping, time-keeping, and auditing practices; or to promulgate the exhaustion and preclusion requirements in issue.[10] (R. 503), (pp. 8-12).

CONCLUSION

For the foregoing reasons and those stated in the Petition, Petitioner respectfully submits that the Petition for a writ of certiorari should be granted.

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[9](...continued)

Smay also admitted that there are no documents filed with either the state or federal governments which identify Respondent as a state entity and that there are no Rules promulgated by the Wisconsin Supreme Court which identify it as a state agency. *Id.* pp. 186-187.

[10]Respondent established LAWPAC after it was told by the Wisconsin Supreme Court that it was precluded from engaging in partisan politics and it continued its unlawful LAWPAC activities for three more years after the Wisconsin Supreme Court ruled they were "proscribed." *In re Regulation of the Bar of Wisconsin,* 81 Wis. 2d xxxv, xxxix (1978); *Matter of Discontinuation of Wis. State Bar,* 93 Wis. 2d 385, 387, 286 N.W. 2d 601, 606 (1980).